

**COMMERCIAL ARBITRATION IN
CYBERSPACE:
THE LEGAL AND TECHNICAL
REQUIREMENTS TOWARDS
A MORE EFFECTIVE
*LEX ELECTRONICA ARBITRALIS***

by

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ABSTRACT

Online Arbitration is an online alternative dispute resolution (OADR) process that resolves disputes without litigation outside national courts. Due to globalisation and increased e-commerce, international commercial online arbitration has become more important and it is therefore essential to look at the legal and technical requirements for a more effective international online arbitration regime or *lex electronica arbitralis*, specifically focused on disputes that arise from cross-border, low value e-commerce transactions for both goods and services, and especially between online businesses and consumers (B2C), but also between online businesses (B2B).

The *lex electronica arbitralis* should lead to swift outcomes that will be able to be enforced efficiently anywhere in the world, without impairing the requirements of accountability, due process, efficiency, impartiality, independence, fairness, transparency, *etc.*

The 'UNCITRAL Technical Notes on ODR of 2016' follows a non-binding guideline format, so there is currently no legal outline that exclusively regulates online arbitration. Due to this *lacuna*, the guidelines of the 'Technical Notes' and rules of traditional international commercial arbitration will have to be used as far as they accommodate online arbitration. Due to its unique features, online arbitration however needs an exclusive set of rules that will deal with its legal and technical requirements.

The most comprehensive manner to have realised an online arbitration regime or *lex electronica arbitralis* would have been by the proposed 'UNCITRAL Draft Procedural Rules (DPR) on OADR for Cross-Border E-Commerce Transactions'. Unfortunately, since Working Group III (WG.III), who was mandated by UNCITRAL to compile the 'DPR', could not manage to reach consensus on many aspects, the 'Technical Notes' was adopted instead. The thesis will review WG.III's progress to complete the 'DPR' and how it eventually led to the adoption of the 'Technical Notes'. The 'Technical Notes' still leaves many questions and uncertainties on many of online arbitration's legal and technical requirements that will be pointed out. The thesis will indicate that these legal and technical requirements do not compose insurmountable challenges, but that UNCITRAL will have to address them when they decide to revise the 'Technical Notes' in the future or when they decide to compile a set of legal standards exclusively for online arbitration in the future.

The focus will also be directed to the future of international arbitration legislation in a developing country such as SA, while a plea is made to SA lawmakers to make provision for online arbitration.

LIST OF KEYWORDS

Arbitration, ADR, Arbitration Forum, Arbitration Service Provider, Applicable Law, Arbitration Agreement, Automatic Enforcement, Binding Character of Result, Choice of Law, Confidentiality, Confidentiality, Agreement governed by Foreign Law, Cyberspace, De-localised Arbitration, Electronic Signature, Enforceability, Enforcement of Award by a Judicial Court, Floating Arbitration, Floating Award, Functional Equivalence, Harmonisation of Legal Framework, Internet, Jurisdiction in Cyberspace, *Lex Fori*, Location of the Arbitration, *Lex Electronica Arbitralis* (International Online Arbitration Regime), National Law to be Applied, New York (NY) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, OADR, Online Arbitration, Online Arbitration Forum, Online Platform, Place of Arbitration, Place of Award, Recognition of Award, Review Procedures, Seat of Arbitration, Seat of Arbitration in Cyberspace, Self-Executing Resolution Techniques, Setting Aside of Award, Signatures, Signing of Award, UNCITRAL, UNCITRAL Arbitration Rules of 2010, UNCITRAL Working Group III (WG.III)'s Draft Procedural Rules (DPR) on OADR for Cross-Border E-Commerce Transactions, UNCITRAL Model Law on International Commercial Arbitration (ICA) of 1985/2006, UNCITRAL Notes on Organising Arbitration Proceedings of 1996, UNCITRAL Technical Notes on ODR of 2016, Validity, Virtual Reality, WIPO's Uniform Dispute Resolution Policy of 1999, World Wide Web.

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CHAPTER 1:

INTRODUCTION

1. INTRODUCTION

This research will focus on the legal and technical reforms that are necessary to ensure an effective online arbitration regime or *lex electronica arbitralis*. This research will therefore have to look at how the 'UNCITRAL Technical Notes on ODR of 2016' will guide the users of online arbitration and to ensure that it conforms with the requirements, distinctive characteristics and already existing regulations pertaining to online arbitration.

Cyberspace is a metaphor of the abstract idea of space. Cyberspace refers to the virtual space between all the computers on earth that has Internet access.¹ Cyberspace is without measurable extent, without restrictions and without terrain.² Cyberspace's most distinguishable characteristic is its indefiniteness.³ Adapting to the spatio-temporal environment of the Internet, specifically to resolve disputes online, necessarily implies that the barriers of cyberspace will have to be overcome.⁴

Since cyberspace is a virtual environment that is asomatous,⁵ disputes will have to be resolved in an interconnected manner.⁶ The solution is online arbitration with the automatic enforcement of an outcome or award.⁷ The parties stay at home, reach an arbitration agreement online, exchange submissions and evidence online, the online arbitrator evaluates the submissions and evidence online and then reaches a decision, in the form of an online arbitration award that should then be enforced automatically.⁸ If the dispute remains unresolved, recourse to a national court, or a cybercourt, should be possible.

The first online arbitration proceeding occurred on 8th May 1996, when an OADR service provider, 'Virtual Magistrate', delivered a resolution in *Tierney and E-Mail America*, after having communicated solely online.⁹ Since this historic beginning, online arbitration service providers have burgeoned.¹⁰

¹ Donahey 'Dispute Resolution in Cyberspace' *Journal of International Arbitration* 15(4) (1998) 163.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ Trudel *Seizing the Law for Globalisation* 221.

⁶ Donahey *op cit* 164.

⁷ Marriot *et al. Handbook of Arbitration* 12-004.

⁸ Donahey *op cit* 164.

⁹ Virtual Magistrate *Tierney and E-Mail America*, docket no 96-0001; Virtual Magistrate 'Virtual Magistrate' at <<http://www.umass.edu/dispute/ncair/gellman.htm>>, accessed 11th of May 2014; Donahey *op cit* 165.

¹⁰ Donahey *op cit* 165; Marriot *et al. op cit* 12-004 – 12-110.

Online arbitration displays similar characteristics as traditional arbitration, such as confidentiality, efficiency, impartiality, *etc.* but has many additional advantages such as putting an end to the need to travel to an arbitration venue, the possibility for parties to agree on a type of tailor-made procedure that will be in accordance with their own unique requirements, *etc.*¹¹ However, because the cyberspace environment is virtual it requires a so-called 'fourth-party' (in addition to the two parties and the online arbitrator) during online arbitration, namely Information Technology (IT). This necessarily has both legal and technical implications that need to be regulated as cyberspace presents a challenging environment.¹²

Today it is easy to resolve e-commerce disputes which occur anywhere in the world, in real time, through the latest IT developments and software programming sciences, such as Adobe Acrobat Reader programs, handheld devices, e-mails, live streaming, Secure Multipurpose Internet Mail Exchange Protocols (SMME), Skype, video conferences, Youtube videos and many other ways over the Internet.¹³ These IT developments and software programming sciences enhance the prospect of resolving e-commerce disputes between parties that live in the outreaches of the globe.¹⁴ Online arbitration proceedings are particularly practical to resolve e-commerce disputes as they lead to a swifter outcome and because they do not require the physical presence of the disputing parties, it saves on accommodation, time and travelling expenses and also opportunity costs.¹⁵ Online arbitration enables parties to resolve their e-commerce dispute in a cost-effective and straightforward manner while all of the fundamental rules and regulations of a legal course of action are adhered to.¹⁶

Arbitration is a particular form of Alternative Dispute Resolution (ADR) that coexists with many other types of *extra curiam* means of adjudication that are alternatives to litigation in national courts. The binding nature of the decision that the online arbitrator reaches, distinguishes arbitration from other types of ADR. On its turn, the virtual nature of, and presence of the so-called 'fourth party' (IT) during an online arbitration proceeding discerns it from the corporeal or physical nature of a traditional arbitration proceeding.¹⁷ As such, online arbitration needs to be regulated by its own rules and regulations since its unique features present their own challenges and legal questions.¹⁸

¹¹ Marriot *et al. op cit* 12-004 – 12-005.

¹² Marriot *et al. op cit* 12-002, 12-009, 12-013; Donahey *op cit* 165.

¹³ Marriot *et al. op cit* 12-011, 12-029 – 12-030, 12-018.

¹⁴ *Ibid.*

¹⁵ Marriot *et al. op cit* 12-014 – 12-019.

¹⁶ Marriot *et al. op cit* 12-004, 12-022 – 12-030.

¹⁷ *Ibid.*

¹⁸ UNCITRAL 'Model Law on International Commercial Arbitration (ICA) (1985/2006)' at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>, accessed 16 June 2013.

Online arbitration is a unique type of arbitration proceeding which is performed completely, or in greater part, by online communication on an online arbitration platform, by means of IT and software applications.¹⁹ The use of online communications during the online arbitration proceeding has to be an indispensable element when the proceeding is performed so as to constitute online arbitration. In the event that online communication is only used sporadically during an online arbitration proceeding, or if the parties use face-to-face communication for the larger part of a proceeding, such a proceeding is no longer an online arbitration proceeding.²⁰

Online arbitration owes its singularity as a particular type of arbitration to innovative IT and software applications that presents it with its unique features.²¹ It is these unique features and differences, when compared with traditional arbitration, that required UNCITRAL to mandate its Working Group III (WG.III) to compile the 'DPR on ODR for Cross-Border E-Commerce Transactions', which eventually led to UNCITRAL's adoption of the 'Technical Notes on OADR of 2016', in an attempt to constitute a singular legal framework for all types of OADR, including online arbitration. The use of IT and software applications to perform online arbitration is of particular significance for the purposes of this thesis.

Since e-commerce occurs in cyberspace, it will be most feasible to resolve e-commerce disputes in cyberspace where they originated.²² In other words, because a dispute originated in cyberspace, the nature of the dispute is online, *i.e.* the dispute will be about something that occurred or was supposed to have occurred online. The more the Internet facilitates e-commerce due to globalisation, the more e-commerce disputes will inevitably arise because more online buyers and more online merchants get involved. As the Internet causes e-commerce to become more and more dependant on online arbitration to resolve its disputes, it also leads to more and more legal and technical challenges. These legal and technical challenges are inevitably interrelated with the Internet's characteristics and infrastructure as well as with IT and software applications.²³

Many legal and technical solutions still need to be developed in order for the *lex electronica arbitralis* to function more effectively. Both the legal and technical challenges are not insurmountable, but they will have to be addressed by UNCITRAL in future.

Although UNCITRAL recently adopted the 'Technical Notes on ODR of 2016' in the place of the 'DPR on OADR for Cross-Border E-Commerce

¹⁹ Katsch, Rifkin *ODR* 93; Marriot *et al. op cit* 12-011, 12-029-12-030, 12-018.

²⁰ Marriot *et al. op cit* 12-022-12-030.

²¹ Katsch, Rifkin *op cit* 93.

²² Marriot *et al. op cit* 12-004.

²³ Goldsmith 'Against Cyber-Anarchy' *University of Chicago LR* 65 (1998) 1228; Marriot *et al. op cit* 12-005, 12-125-12-126.

Transactions, there still exist no universal legal framework that exclusively regulates online arbitration, so for this reason, the regulations of the legal framework that governs traditional arbitration, most notably the 'UNCITRAL Model Law on International Commercial Arbitration (ICA) of 1985/2006', and the 'UNCITRAL NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958' and 'UNCITRAL Technical Notes on ODR of 2016' will have to be used until UNCITRAL one day decides to either revise the 'Technical Notes' or to compile an exclusive set of legal standards focused on online arbitration. Since online arbitration and the platforms that it uses have unique features, a special set of legal standards is needed just to regulate online arbitration. Consequently, this research will have to look at what degree the 'Technical Notes' addresses the legal and technical requirements of online arbitration and which legal and technical requirements still needs to be addressed. The future direction of SA's international arbitration legislation will also be looked at in the attempt to help focus these recent developments on the legal and technical requirements towards a more effective *lex electronica arbitralis*.

2. OBJECTIVES OF THE THESIS

Online arbitration presents numerous multifaceted legal and technical challenges. Consequently, this research will look at what degree the 'Technical Notes' addresses the legal and technical requirements of online arbitration and which legal and technical requirements still needs to be addressed.²⁴

A clear understanding of how the 'Technical Notes' will benefit OADR, and more specifically, online arbitration, is needed to better understand how online arbitration is currently regulated, but to also look at how it should ideally be regulated.²⁵

At present, the degree of potential parties' confidence is still way too low to unleash the full potential of e-commerce and as a result, online arbitration.²⁶ Establishing confidence online is a greater challenge than building it offline.²⁷ This is because physical interaction is an important component to create and maintain confidence in offline transactions.²⁸

The lack of confidence in e-commerce and online arbitration may be ascribed largely to a deficiency of personal interaction that does not occur in the online marketplace.²⁹ Unfortunately, the Internet also enables bad, fraudulent

²⁴ Marriot *et al. op cit* 12-134.

²⁵ Marriot *et al. op cit* 12-125 – 12-126.

²⁶ Rule *OADR for Businesses* 92; Marriot *et al. op cit* 12-125 – 12-126.

²⁷ Hurter 'An Analysis of a New State of the Art SA ODR System' *SA Mercantile LJ* 16 (2004) 780.

²⁸ Bordone *OADR op cit* 176.

²⁹ Hurter 'An Analysis of a New State of the Art SA ODR System' *op cit* 780.

and illegal business deals and operations to occur while actors' true identity are sometimes unrevealed.³⁰

Online arbitration will only function well when certain requirements are satisfied. The two foundations that enable online arbitration to function can be distinguished as efficiency and fairness.³¹ Efficiency is interrelated with the competence and speed in which an online arbitration proceeding can produce a legally valid outcome. Fairness is an important matter with online arbitration due to the inequality of access to resources. Although it will always be difficult to attain ideal justice, it is nevertheless important to investigate the requirements that are set to reach fairness in cyberspace.³² Efficiency in other words refers to the fair and reasonable application of the law, while fairness attempts to find an appropriate balance between justice and equality.³³

It is also required to look at due process in online arbitration. A large challenge for online arbitration is the way in which it adapts to the Internet and makes the most of all the opportunities that the Internet afford, while online arbitration should at the same time preserve the authenticity, integrity and values of traditional arbitration.³⁴

When UNCITRAL decides to revisit the 'Technical Notes' or to compile a set of legal standards that is exclusively focused on online arbitration, it would have to focus on the further regulation of the following legal requirements: (1) the OADR procedure; (2) the global OADR framework, with a focus on both the relevant roleplayers and the components of such a framework; (3) the relevant legal principles; (4) the design of OADR proceedings; (5) the regulation of neutral third parties; (6) the finer points in the OADR proceeding; (7) the enforcement of decisions.

UNCITRAL would also have to focus on the regulation of the following technical requirements: (1) the certification of service providers; (2) incentives for users; (3) the relationship between the OADR service provider and the ODR platform, as well as (4) a technical enforcement protocol.

Lastly, the current arbitration regime in SA, as an example of a developing country, will also be looked at in order to determine how it should develop to accommodate online arbitration.

3. OUTLINE OF RESEARCH TOPIC

Online arbitration was specifically selected since it is the most formal of all the OADR courses of action in the field of international commercial

³⁰ Rule *OADR for Businesses* *op cit* 4; Marriot *et al. op cit* 12-101 – 12-102.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

arbitration. All the other OADR courses of action are characterised by less formal proceedings, and none of them ultimately leads to a final award that is binding in nature. Besides this distinctive characteristic, traditional arbitration is also administered by the international legal framework created by the 'Model Law on ICA of 1985/2006' and which has been accepted by most legal jurisdictions, while the awards that are made are enforced by the 'NY Convention of 1958'. The fact that a traditional arbitration legal framework or *lex traditum arbitralis* is very well-established, could help act as a reference in situations where the *lex electronica arbitralis* has no set legal answers or procedures to help interpret an answer by means of deductive reasoning.

A point of reference throughout will be the 'Model Law on ICA', which many legal jurisdictions have accepted, and which forms a more or less homogeneous universal legal framework for arbitration. The research will not take any national arbitration legislation into specific account, save for SA's arbitration law and the UK's arbitration law, since the latter's legislation forms the historical basis of SA's arbitration law. Since certain aspects of the EU law have important consequences for online arbitration, such legal aspects will be singled out. Examples from other national legislation that regulates certain aspects that goes unregulated in these jurisdictions will however be pointed out, without necessarily breaking it down into a detailed analysis. Relevant case law from any country or region will however be referred to wherever it is sensible.

After economic sanctions were lifted against SA after its first democratic elections took place in 1994, the country was welcomed back to the international community, only to find that many of its laws related to international trade and investment were outdated and inadequate for the new era of e-commerce that has dawned. An obvious example is in the field of online arbitration and the problem is a serious one.³⁵ Even though SA is a developing country and provides in most needs of potential investors, such as free and fair elections that are held every five years, good infrastructure, a reliable justice system and some great business opportunities, such investors are also interested in how disputes will be resolved by online arbitration. Yet, there are no references to international online arbitration in current SA legislation.³⁶

SA still lacks an international arbitration framework. In SA, both traditional and online arbitration, whether domestic or international, is still governed by the old-fashioned 'SA Arbitration Act 42 of 1965'.³⁷ Unfortunately, this law was designed for domestic traditional arbitration and has no provision that regulates international arbitration and domestic arbitration separately, not to even mention online arbitration.³⁸ The 'SA Arbitration Act' is totally inadequate for the purpose

³⁵ Goff *An International Arbitration Act for SA* 6.

³⁶ *Ibid.*

³⁷ Ramsden *The Law of Arbitration* 13-24; Butler, Finsen *Arbitration in SA* 201.

³⁸ Butler, Finsen *op cit* 201.

of dealing with either international or online arbitration.³⁹ The matter is so important that the SA Law Commission (SALC) already recommended in 1995 that SA should introduce an International Arbitration Act that will result in SA arbitration law being in line with the 'Model Law on ICA'.⁴⁰ Although the SA Cabinet has already approved the SA International Arbitration Bill, it must still be tabled in the form of a white paper in the SA National Assembly; no date has however been set for this to happen.⁴¹

This research also wants to look at what SA has to do if it wants a suitable law on international commercial arbitration that will also regulate online arbitration.

4. RESEARCH QUESTION

This research will have to look at what degree the 'Technical Notes' addresses the legal and technical requirements of online arbitration and which legal and technical requirements still needs to be addressed in order to make the *lex electronica arbitralis* more effective.⁴²

A clear understanding of how the 'Technical Notes' will enable OADR, and more specifically, online arbitration, is needed to better understand how the *lex electronica arbitralis* is currently regulated, but to also look at how it should ideally be regulated.⁴³

UNCITRAL has mandated WG.III on OADR in 2010 to compile a set of legal standards for OADR which has led to UNCITRAL acceptance of the 'Technical Notes', and although focused on OADR, it today constitutes the basic legal outline of the *lex electronica arbitralis*.

This research makes the argument that although OADR is today regulated to some extent by the 'Technical Notes', many legal and technical challenges and *lacunae* still exist in online arbitration that UNCITRAL will still have to resolve. Hopefully UNCITRAL will mandate WG.III at some point in the future to revisit the 'Technical Notes' or to compile a set of legal standards that is focused exclusively on online arbitration, to address all of these legal *lacunae* and technical challenges.

It is important that research had to be undertaken to help determine which legal and technical aspects pertaining to online arbitration still needs to be regulated in future in order to constitute a more effective *lex electronica*

³⁹ Christie 'SA as a Venue for ICA' *Arbitration International* 9(23) (1993) 153.

⁴⁰ Wakefield R 'SA Set to Enter the International Arbitration Phase' *Lawyers for Africa Blog* at <<http://www.lawyersforafricablog.com/2014/08/south-africa-set-to-enter-the-international-arbitration-Phase/>>, accessed 12 February 2016; Hurter 'Dispute Resolution in Cyberspace' *SA Mercantile LJ* 200 – 201.

⁴¹ *Ibid.*

⁴² Marriot *et al. op cit* 12-134.

⁴³ Marriot *et al. op cit* 12-125 – 12-126.

arbitralis. As far as could be determined this thesis seems to constitute the very first academic attempt to research the compilation of the 'Technical Notes'.

Since so many challenges still exist on UNCITRAL's road to constitute an effective *lex electronica arbitralis*, the strengths and weaknesses of the 'Technical Notes' will have to be evaluated, and when necessary, it should be evaluated against existing arbitration legislation and case law so as to highlight the parallels and contradictions in existing domestic and international law as common ground need to be found. This will especially be the case once the 'Technical Notes' gets implemented in practice.

Since the 'Technical Notes', Section I s.v. 'Non-Binding Nature of Technical Notes', article 6 determines that the 'Technical Notes' is a descriptive document which is not intended to be exhaustive or exclusive, nor suitable to be used as rules for any OADR proceeding, and since it does not impose any legal requirement binding on the parties, this thesis makes a case that UNCITRAL should mandate WG.III in future to compile a set of legal standards that is exclusively focused on online arbitration.⁴⁴ To this end, this thesis provides background on how far roleplayers have already addressed the legal and technical requirements pertaining to the *lex electronica arbitralis* and will suggest legal and technical matters that UNCITRAL and others will still have to address if they want to regulate online arbitration, and not just OADR, comprehensively.⁴⁵

Since there exist so many legal uncertainties and technical challenges, it is inevitable that UNCITRAL would have to one day regulate the *lex electronica arbitralis* in a more comprehensive manner than the current 'Technical Notes' does. It is now up to research to try and devise the legal and technical details of the *lex electronica arbitralis* and how it should most optimally function in practice. In this regard, it will be important to look at existing *supra*-national and domestic legislation and already existing private OADR efforts, by means of case studies, and best-practice examples from around the world.

This research is important because online arbitration, due its unique characteristics and requirements, needs its own detailed *lex electronica arbitralis*, without merely paralleling the traditional arbitration process and without being merely regulated in terms of the 'Technical Notes' general OADR terms. A sole focus should be placed on just online arbitration. The thesis therefore explores the distinct legal features of online arbitration, such as the online arbitration agreement, the pertinent procedural and evidentiary rules, the choice of law issues relevant to the underlying transaction and the resolution of

⁴⁴ UNCITRAL 'Report of 49th Session (29 June–16 July 2016 A/70/17)', Annexure A; section I s.v. 'Non-Binding Nature of Technical Notes', article 6 at http://www.uncitral.org/pdf/english/commission/sessions/unc/unc-49/draft_report_for_the_website_with_watermark.pdf, accessed 15 November 2016.

⁴⁵ *Ibid.*

the dispute, jurisdictional issues and the validity of online arbitration agreements *etc.*, to see whether the 'Technical Notes' addresses these matters comprehensively. This thesis then attempts to couple these distinct legal features with the latest technical developments in IT and software applications, and also with the work that WG.III has already done in this regard, to help give input into how the ideal online arbitration proceeding should be constituted.

The thesis will indicate that under certain conditions online arbitration proceedings already lead to legally valid outcomes, but that it will be more able to reach its full potential if IT and software applications are used more optimally.

This research is also in line with UNCITRAL's goal of enhancing cooperation in the field of international trade law.⁴⁶ To this end, the laws on international trade and arbitration should be modernised and harmonised.⁴⁷

At the end, the main research question that drives this thesis is, in light of what has been done so far, what should still be done to make sure that the *lex electronica arbitralis* for cross-border, low-value, e-commerce disputes is technically more practical and leads to valid awards that can be automatically enforced? What legal and technical obstructions existed or still exists and how where they overcome or should they be overcome? In addition hereto, what legal and technical requirements should WG.III still look at and pay special attention to when they one day compile a set of legal standards especially for online arbitration? What best-practice examples already exist that could help serve as models in certain instances where guidance are still needed on the legal and technical requirements of online arbitration?

A *lex electronica arbitralis* that functions optimally will ultimately bolster e-commerce, which will in turn lead to higher living standards.⁴⁸ In order to increase new economic opportunities worldwide, WG.III should compile a set of legal standards exclusively focused on online arbitration that is in harmony with existing legislation.⁴⁹ The goal of this thesis is to help see this dream turn into reality, taking cognisance of all of the legal and technical challenges that cyberspace presents and see how they could be circumvented.⁵⁰

5. SCOPE OF E-COMMERCE EXAMINED

Since e-commerce has such a broad scope, it is necessary to limit the scope of e-commerce that will be examined.

⁴⁶ UNCITRAL 'About UNCITRAL', s.p. at <http://www.uncitral.org/uncitral/en/about_us.html>, accessed 17 October 2016.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

5.1. The Definition of E-Commerce

E-commerce is the facilitation of commerce in goods or services by networks of computers through the Internet.⁵¹ E-commerce necessarily makes use of IT and any combination of online activities or applications, such as automated data collection systems, electronic data interchange (EDI), electronic funds transfer (EFT), Internet marketing, inventory management systems, mobile commerce, e-commerce transaction processing and the provision of payment.⁵² E-commerce typically uses the World Wide Web (WWW) for a certain section of the life cycle of the transaction although other technologies could also be used.⁵³

5.2. Scope of E-Commerce Examined is based on Scope of 'UNCITRAL Technical Notes on ODR of 2016'

The 'Technical Notes', Section IV: 'Scope of ODR Process', article 22 determines that the scope of its OADR process may be particularly useful for disputes arising out of cross-border, low-value, e-commerce transactions.⁵⁴ Article 22 elaborates by saying that an OADR process may apply to disputes arising out of both a business-to-consumer (B2C) as well as business-to-business (B2B) transactions.⁵⁵ In addition, article 23 adds that an OADR process may apply to disputes arising out of both sales and service agreements.⁵⁶

In this regard, the main focus of this thesis would necessarily also have to be on cross-border, low-value, e-commerce transactions.⁵⁷ Attention will be paid to both B2C as well as B2B e-commerce transactions, and also to disputes that arise from both sales and service agreements.⁵⁸

A bigger focus will however be placed on disputes that arise from B2C disputes, because these types of disputes more frequently involve low-value

⁵¹ TechTarget 'What is E-Commerce?', s.p. at <<http://searchcio.techtarget.com/definition/e-commerce>>, accessed 11 November 2016.

⁵² Business Now 'Facts 101: Business Key Facts', s.v. 'E-Commerce' at <[https://books.google.co.za/books?id=U0_LAwAAQBAJ&pg=PT11&lpg=PT11&dq=E-commerce+necessarily+makes+use+of+IT+such+as+automated+data+collection+systems,+electronic+data+interchange+\(EDI\),+electronic+funds&source=bl&ots=RTx5I-l-6p&sig=7gq40QdiLO-0roEaiif4VkhDsoY&hl=en&sa=X&ved=0ahUKEwjP76vriKbRAhUfKsAKHUnTAAEQ6AEIHjAB#v=onepage&q=E-commerce%20necessarily%20makes%20use%20of%20IT%20such%20as%20automated%20data%20collection%20systems%2C%20electronic%20data%20interchange%20\(EDI\)%2C%20electronic%20funds&f=false](https://books.google.co.za/books?id=U0_LAwAAQBAJ&pg=PT11&lpg=PT11&dq=E-commerce+necessarily+makes+use+of+IT+such+as+automated+data+collection+systems,+electronic+data+interchange+(EDI),+electronic+funds&source=bl&ots=RTx5I-l-6p&sig=7gq40QdiLO-0roEaiif4VkhDsoY&hl=en&sa=X&ved=0ahUKEwjP76vriKbRAhUfKsAKHUnTAAEQ6AEIHjAB#v=onepage&q=E-commerce%20necessarily%20makes%20use%20of%20IT%20such%20as%20automated%20data%20collection%20systems%2C%20electronic%20data%20interchange%20(EDI)%2C%20electronic%20funds&f=false)>, accessed 11 November 2016.

⁵³ TechTarget 'What is E-Commerce?' *op cit* s.p.

⁵⁴ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section IV, article 22.

⁵⁵ *Ibid.*

⁵⁶ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section IV, article 23.

⁵⁷ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section IV, article 22.

⁵⁸ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section IV, article 23.

goods.⁵⁹ This does however not mean that B2B disputes will not be looked at; both B2C and B2B disputes resort under the mandate that UNCITRAL afforded to WG.III to focus on when they had to compile the 'DPR'. Whenever B2C e-commerce disputes needs to be contrasted with other types of e-commerce disputes, such as B2B e-commerce disputes, the specific type of e-commerce under consideration will be pointed out and distinguished.

At WG.III's 22nd Session that was held in Vienna from 13 December until 17 December 2010, the scope of work that had to be undertaken in terms of UNCITRAL mandate to WG.III to compile the 'DPR', was set out neatly and this will be referred to many times.⁶⁰

5.2.1. Both B2C and B2B E-Commerce Transactions, but with a Bigger Focus on B2C E-Commerce Transactions

UNCITRAL's mandate to WG.III pertains to both B2C and B2B transactions low-value e-commerce disputes, with the mandate stating that WG.III should have regard to different approaches instead of a single set of procedural rules.⁶¹ UNCITRAL said that although it would be best to compile a generic set of rules for both B2B and B2C transactions, WG.III may suggest another approach.⁶²

If UNCITRAL's mandate was limited to a B2B-only proposal, WG.III would have avoided complex consumer protection questions that have divided WG.III and it would have facilitated a more brisk compilation of the initial 'DPR' that later resulted in the 'Technical Notes'.⁶³ A process that would have only focused on B2B disputes would not have spoken to B2C e-commerce disputes which constitutes the greater part of all e-commerce disputes due to its low-value nature.⁶⁴ Besides, WG.III would then have lost sight of its mandate from UNCITRAL which dictates a focus on low-value e-commerce disputes.⁶⁵

⁵⁹ Investopedia 'Business to Consumer: B to C Definition', s.p.at

<<http://www.investopedia.com/terms/b/btoc.asp>>, accessed 5 November 2016.

⁶⁰ Working Group III (WG.III) 'ODR for Cross-Border E-Commerce Transactions' (22nd Session A/CN.9/WG.III/WP.105)', par.24-par.27(a).

⁶¹ WG.III 'Report of 22nd Session (Vienna, 13 – 17 December 2010 A/CN.9/716)' par.14 at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V11/801/48/PDF/V1180148.pdf?OpenElement>>, accessed 22 October 2016.

⁶² WG.III 'ODR for Cross-Border E-Commerce Transactions' (A/CN.9/WG.III/WP.105)' op cit par.2; par.24.

⁶³ WG.III 'Report of 27th Session (NY, 20 – 24 May 2013 A/CN.9/769)', par.18 at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V13/840/15/PDF/V1384015.pdf?OpenElement>>, accessed 5 November 2016.

⁶⁴ *Ibid.*

⁶⁵ WG.III 'Report of 27th Session (A/CN.9/769)' op cit par.19.

5.2.2. 'Technical Notes on ODR of 2016', article 22: Low-Value E-Commerce Disputes

At WG.III's 28th Session which was held in Vienna on 18 November – 22 November 2013, it was queried whether the term 'low-value' was clear enough for legal application and for inclusion in a set of legal standards.⁶⁶

With regards to the term, 'high-volume', it was said that for a user of the 'DPR', the nature of times that a good or service is sold or procured would be irrelevant, and that it is in addition a relative concept.⁶⁷ After debate, it was decided to delete the term 'high-volume' from the 'DPR' preamble.⁶⁸

With regards to the inclusion of the term, 'low-value' in the 'DPR' Preamble, different viewpoints were aired on whether the term should be defined or not.⁶⁹ On the one hand it was said that a definition would provide legal certainty on when the 'DPR' should be applied and that it would be relevant from a consumer protection viewpoint.⁷⁰ In addition it was added that the 'DPR' would be limited if its scope was restricted to low-value transactions.⁷¹ On the other hand, it was stated that deciding on a definition for 'low value' would be extremely difficult, as it is a relative concept that could change over time and would differ from country to country.⁷² In this regard, WG.III recalled the decision from its 24th Session which was held in Vienna from 14 November to 18 November 2011 that said that all indicative information should be set out in accompanying Guidelines to the 'DPR'.⁷³ Today, the 'UNCITRAL Technical Notes on ODR of 2016', Section V contains no definition for 'low-value'.⁷⁴

It was also stated at the 24th Session that the prospect in practice would be that an online arbitration service provider would determine the threshold of what would constitute a low-value transaction for his/her intents and purposes but that the proposed 'Guidelines to the Technical Notes on ODR of 2016' should ultimately regulate this concept directly or indirectly.⁷⁵

⁶⁶ WG.III 'Report of 28th Session (Vienna, 18–22 November 2013 A/CN.9/795)', par.23 at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V13/881/98/PDF/V1388198.pdf?OpenElement>>, accessed 28 October 2016.

⁶⁷ WG.III 'Proposal by the Governments of Colombia, Honduras, Kenya and the United States' (Vienna 28th Session 18 – 22 November 2013 A/CN.9/WG.III/WP.125), par.12 at <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/860/13/PDF/V1386013.pdf?OpenElement>>, accessed 28 October 2016; WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.23.

⁶⁸ WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.24.

⁶⁹ WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.25; par.31-par.32.

⁷⁰ WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.25.

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ WG.III 'Report of 24th Session (Vienna, 14 – 18 November 2011 A/CN.9/739), par 16 at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V11/873/02/PDF/V1187302.pdf?OpenElement>>, accessed 5 November 2016; WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.25.

⁷⁴ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section V.

⁷⁵ WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.25.

5.2.3. 'Technical Notes on ODR of 2016', article 23: Both Sale of Goods and Service Procurement Agreements concluded by Online Communication

The 'Technical Notes', Section IV: 'Scope of ODR Process', article 23 states that the Technical Notes shall be applicable whenever the parties to a sale of goods agreement or a service procurement agreement concluded their agreement by means of online communications.⁷⁶

6. ACADEMIC AND PRINCIPAL REASONS FOR SELECTING THE TOPIC

The focus area of this research is of great significance as e-commerce, increases, expands and intensifies on a daily basis. As this occurs, it can be assumed that more and more disputes relating to e-commerce transactions will occur as globalisation intensifies. An all-encompassing set of regulations for online arbitration that will guarantee a just and effective proceeding, is hereby foreseen, once UNCITRAL mandates WG.III to either revisit the 'Technical Notes' or to compile a set of legal standards exclusively focused on online arbitration.

If UNCITRAL wants to regulate online arbitration, its set of legal standards will have to be clearer and more detailed than the current 'Technical Notes'. Although the legal framework that regulates traditional arbitration may to a lesser extent be applicable and related to online arbitration, there are definite matters and questions which call for specific regulation.

A few of the matters and questions that may necessitate special regulations are the following:⁷⁷

- The requirement for parties to decide on a place of arbitration;⁷⁸
- The means of communication used during an online arbitration would have to be standardised and controlled;⁷⁹
- Regulations will have to guarantee that due process will be followed, despite the swiftness of online communications;⁸⁰
- Not all legal jurisdictions acknowledge the validity of online documents and electronic signatures, and this raises doubts about the authenticity of

⁷⁶ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section IV, article 23.

⁷⁷ Kuner 'An International Legal Framework' *Computer Law and Security Report* 25(1) (2009) 311–315; Prendes *op cit* 41.

⁷⁸ Kuner 'An International Legal Framework' *op cit* 311–315; Prendes *op cit* 41.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

an online arbitration agreement, and about the prospect of enforcing an online arbitration award embodied in an online document.⁸¹

- The service and notifications procedures executed through online means of communication need to be standardised and controlled in order to be legally valid;⁸²
- Security means are needed to protect the confidentiality and integrity of the online arbitration proceeding;⁸³ and
- Automatic means of enforcing the online arbitration award that steers clear of judicial intervention should be explored.⁸⁴

Online arbitration should be regulated by a more coherent and detailed set of rules than the 'Technical Notes', so that all the particular matters and questions raised by online arbitration can be solved, and to prevent dissimilar or conflicting interpretations by different online arbitrators.

Thanks to the 'NY Convention' and the 'Model Law on ICA',⁸⁵ there is in a certain sense, a harmonised universal legal framework for traditional international commercial arbitration, but legal *lacunae* remains with regards to online arbitration, especially after UNCITRAL's acceptance of the 'Technical Notes'. The harmonisation brought about by the 'Technical Notes' will be of great benefit to disputants in OADR, but these benefits should now be extended in greater detail to online arbitration.

7. BROAD ISSUES AND QUESTIONS TO BE CONSIDERED

This research departs from the basis that a comprehensive and detailed online arbitration legal framework is required and will investigate how the 'Technical Notes' will have to overcome many legal and technical challenges in order to reach this goal.⁸⁶

It is important for the purpose of this research that e-commerce and its relation with the Internet and cyberspace is understood as much as possible before it is looked at how online arbitration is to be ideally regulated within such an environment in the future.⁸⁷

It has been pointed out that to comply with the legal and technical requirements of online arbitration, special attention needs to be given to the confidentiality and security requirements. At present, the degree of actors'

⁸¹ Kuner 'An International Legal Framework' *op cit* 311–315; Prendes *op cit* 41.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit*.

⁸⁶ Marriot *et al.* *op cit* 12-134.

⁸⁷ Marriot *et al.* *op cit* 12-125 – 12-126.

confidence and trust is still way too low to unleash the full potential of online arbitration.⁸⁸

The requirements of efficiency and fairness are also so important that online arbitration will only function if they are met.⁸⁹ Fairness is important due to the inequality of access to the use of legal and technical resources. Online arbitration requires its own application of fairness as cyberspace is unique.⁹⁰ Efficiency will also have to be redefined so as to take the unique nature and limitations of cyberspace into consideration.⁹¹

The significance of due process in an online arbitration proceeding also needs to be accentuated, and it will be important for such proceedings to be characterised by integrity and authenticity.⁹²

The supreme test will be to improve the existing *lex electronica arbitralis* so that it will increase access to justice, lead to legally valid outcomes, and enable the automatic enforcement of online arbitration awards.⁹³

8. STRUCTURE

Chapter 1 is entitled; 'Introduction'. It will begin with an (1) Introduction. Then it will look at (2) objectives of the research; (3) an outline the research topic; (4) the research question; (5) the scope of the e-commerce examined; (6) the academic and principal reasons for selecting the topic; (7) broad issues and questions to be considered; (8) give a lay-out of the structure of the research; and (9) set out the research methodology, before (10) ending with a conclusion.

Chapter 2 is entitled; 'OADR'. It will begin with an (1) Introduction. Then it will look at (2) an overview of OADR; (3) the international and domestic legal framework pertaining to traditional arbitration and online arbitration; and at (4) the difference between online arbitration and traditional arbitration, before (5) ending with a conclusion.

Chapter 3 is entitled; 'The Online Arbitration Proceeding'. It will begin with an (1) Introduction. Then it will look at (2) the online arbitration agreement; (3) the choice of law of the transaction and choice of law for the resolution of the dispute; and at (4) the procedural and evidential rules pertaining to the online arbitration proceeding; before (5) ending with a conclusion.

Chapter 4 is entitled; 'The Legal Characteristics of Online Arbitration'. It will begin with an (1) Introduction. Then it will look at the (2) legal characteristics

⁸⁸ Rule *OADR for Businesses* op cit 92; Marriot et al. op cit 12-125 – 12-126.

⁸⁹ Marriot et al. op cit 12-005.

⁹⁰ Bianchi et al. 'The Changing Face of International Arbitration' *Journal of International Arbitration* 17(4) (2000) 19.

⁹¹ *Ibid.*

⁹² Bianchi et al. op cit. 19.

⁹³ *Ibid.*

of the Internet and the requirements of online arbitration; (3) the legal requirements for fair and efficient online arbitration; and at (4) the recognition and enforcement of the outcome of an online arbitration proceeding; before (5) ending with a conclusion.

Chapter 5 is entitled; 'The Technical Requirements of Online Arbitration'. It will begin with an (1) Introduction. Then it will look at the (2) technical characteristics of the Internet and requirements of online arbitration; (3) the technical self-regulatory framework of the Internet; (4) the distinctive technical characteristics of the Internet; (5) the transcendental character of the Internet from a technical perspective and its consequences for jurisdiction and the applicable law in cyberspace; (6) the distinctive technical requirements of online arbitration; and (7) it will help define standards for the technological solutions of online arbitration; before (8) ending with a conclusion.

Chapter 6 is entitled; 'UNCITRAL WG.III's DPR and EU Legislation on ODR'. It will begin with an (1) Introduction. Then it will look at the (2) objective of the 'DPR'; (3) the 'DPR' itself; (4) the evolution of EU legislation on consumer disputes and online arbitration; (5) the main challenges that prevented UNCITRAL's approval of the DPR; (6) WG.III's decision to follow the 'Two-Track' solution; and at (7) UNCITRAL's acceptance of the 'Technical Notes'; before (8) ending with a conclusion.

Chapter 7 is entitled; 'Arbitration in SA'. It will begin with an (1) Introduction. Then it will look at (2) SA's current traditional arbitration framework; (3) the progress of SA ADR and arbitration law reform (by year); before (4) ending with a conclusion.

Chapter 8 is entitled; 'Conclusion'. It will begin with an (1) Introduction. Then it will look at (2) building a global redress system for online arbitration; (3) the scope of application of the 'Technical Notes'; (4) identify what still needs to be done to constitute the *lex electronica arbitralis*; (5) look at the need for a common approach to consumer redress: achieving convergence between the 'Technical Notes' and the EU legislation; (6) the future direction of online arbitration in SA; before (7) ending with the final remarks.

The references will be contained at the back.

9. RESEARCH METHODOLOGY

As should be apparent from the above structure, this research intends to reflect on the primary and secondary research questions from a theoretical as well as from a practical perspective.

The following forms of relevant material were used: firstly, academic literature because there is an increasing *corpus* of academic literature that critically takes the theoretical as well as philosophical groundwork of commercial arbitration, as well as its online evolution, into account. Many articles and reports

on arbitration in SA were also consulted. The SA experience was also evaluated with the experience of other signatories to the 'NY Convention'⁹⁴ as well as the 'Model Law on ICA'.⁹⁵

Secondly, *supra*-national legislation, regional legislation and domestic legislation and reports were consulted. The 'NY Convention' is an important piece of *supra*-national legislation because it sets out the distinctive characteristics that an arbitration proceeding and award must have in order to be requisite and enforceable. 149 States approved and acceded to this 'Convention' and have brought their national legislation in conformity with it.

The 'Model Law on ICA' has been received and implemented in the legal jurisdictions of most of the signatory states of the 'NY Convention'. The 'Model Law on ICA' is an important instrument, because it presents a comprehensive legal framework for international commercial arbitration. Its regulations are of great relevance to online arbitration and have been rounded off by additional resolutions and guidelines.

Thirdly, since UNCITRAL WG.III's 'DPR on OADR for Cross-Border E-commerce Transactions' are of such great importance for this research, all the reports of WG.III's sessions, ranging from the 22nd Session, until its last meeting, which was its 33rd Session, that was held in NY from 29 February until 4 March 2016, were consulted.

Fourthly, UNCITRAL's 'Technical Notes on ODR of 2016' served as a source of its own. Although the official text of the 'Technical Notes' has not as yet been posted on UNCITRAL's website, the approved version of the 'Technical Notes' was used as they are found as 'Annexure A' at the back of 'UNCITRAL's Report of its 49th Session', that was held in NY on 29 June until 16 July 2016.⁹⁶

Fifthly, national legislation promulgated in specific countries will not specifically be analysed, save in the EU, SA and UK's contexts, and even then only on specific aspects. Examples from different national legislation will nevertheless be pointed out, without necessarily breaking it down into a detailed analysis.

Sixthly, relevant case law from some of mostly the EU, SA, the UK and the USA will be referred to in the appropriate instances.

10. CONCLUSION

The overarching phrase, OADR, is employed to begin with before the focal point is henceforth moved in the direction of the more specified phrase of

⁹⁴ UNCITRAL 'NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)' at <http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html>, accessed 20 October 2016.

⁹⁵ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit*.

⁹⁶ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A.

online arbitration.⁹⁷ Likewise, the phrase 'neutral third party' is employed to indicate the functionary who assumes the responsibility to resolve the online dispute. The motivation for employing this phrase is to uphold an impartial position prior to specifically mentioning the functionary as an 'online arbitrator', once the focus shifts from OADR in general to online arbitration specifically.⁹⁸

Essential meanings and explanations will be given and a determination of any limits will be pointed out.

⁹⁷ Lazic 'The Impact of Uniform Law on National Law' *Electronic Journal of Comparative Law* 13(2) (May 2009) 18.

⁹⁸ *Ibid.*

CHAPTER 2:

ODR

1. AN OVERVIEW OF OADR

ODR refers to *extra curiam* means of adjudication that regulate and resolve e-commerce disputes beyond the ambit of traditional arbitration.¹ In this respect, the 'Technical Notes', Section V, article 24 states that ODR is a mechanism to resolve disputes through the use of online communications and IT.²

ODR has benefits when compared with traditional litigation, such as confidentiality, efficiency, swiftness and the prospect of tailor-made procedures to specifically suit the needs for parties.³ The most important categories of OADR are online negotiation, online mediation and online arbitration and these categories, and hybrid forms of them, such as a combination of online mediation and online arbitration. However, because the online environment is different from the offline environment, the technical and legal requirements differ greatly.⁴

ODR is evolving in new directions with the latest IT developments and software applications, which enables the resolution of disputes through software programmes and applications, such as Adobe Acrobat Reader, BlackBerry Messenger, audiovisual material, e-mails, Facebook, handheld devices, Instant Messaging (IM), live streaming, Secure Multipurpose Internet Mail Exchange Protocols (SMME), Skype, videoconferences, WhatsApp, etc.⁵ These computer programmes and software applications enable online arbitration to resolve e-commerce disputes between disputing parties that live in diverse regions of the globe as it does not require the parties to be physically present at the arbitration venue – everything can today be done online.⁶

1.1. The Suitability of Online Arbitration

It is important to look at when online arbitration is the most suitable option to resolve a dispute, but also when it is not, so as to give a nuanced view.⁷

¹ Marriot *et al.* *op cit* 12-004.

² UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section V, article 24.

³ Marriot *et al.* *op cit* 12-004 – 12-005.

⁴ Marriot *et al.* *op cit* 12-002, 12-009, 12-013; Donahey *op cit* 165.

⁵ Marriot *et al.* *op cit* 12-011, 12-029 – 12-030, 12-018.

⁶ Marriot *et al.* *op cit* 12-014 – 12-019.

⁷ Goodman 'The Pros and Cons of ODR' *s.p.* at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr>, accessed 8 November 2016.

1.1.1. When is Online Arbitration Suitable?

The Internet is a neutral medium and this makes cyberspace an ideal 'place' to resolve the disputes that arose in it.⁸ The Internet provides a neutral forum for online arbitration to occur and as a result, cyberspace automatically prevents any party from exploiting the potential of prejudice due to 'home court advantage.'⁹

Online arbitration is effective because it allows parties to have a solution in a much quicker time than litigation or traditional arbitration, and as a result it also contains legal expenses when compared with litigation or traditional litigation. It allows more flexible procedures to be used during the proceeding, and entails more creative solutions, tailor-made to the needs of the parties.¹⁰ Online arbitration is especially suitable whenever the special needs of the parties require a flexible approach, tailored to their own specific needs, according to the online nature of their business.¹¹

One of the greatest advantages of online arbitration is that it does not require the parties to travel long distances.¹² Parties get the opportunity to participate in real time from anywhere in the world, wherever they are at a given moment.¹³ Online arbitration does not require additional expenses that go along with the dispatch of relevant documents, submissions or evidence by courier halfway around the world or the rent to obtain a neutral venue to conduct the proceeding.¹⁴ Since it also does not require the online arbitrator to travel, online arbitrators can now more easily be available and this makes it easier to procure the services of an experienced online arbitrator that is an expert in the area of the parties' dispute and to procure their service at a much lower cost, *i.e.* without travel and subsistence allowances.¹⁵ Since the online arbitrator is not required to travel anywhere, more online arbitrators will also be able to offer their services, resulting in more competitive fees, and a greater pool of expertise to choose from. Online arbitration is also especially suitable whenever an expert opinion has to be obtained for a proceeding or whenever a witness needs to testify; it is not always possible or economical for the parties to pay the travel and subsistence allowances for experts and/or witnesses.¹⁶

⁸ Negi 'Concept and Overview of Online Arbitration', 6 at <file:///C:/Documents%20and%20Settings/Julian/My%20Documents/Downloads/SSRN-id2715684.pdf>, accessed 25 August 2016.

⁹ Victorio 'Internet Dispute Resolution (IDR)' *Pepperdine Dispute Resolution Journal* 1(2001)279.

¹⁰ Hörnle Cross-Border Internet Dispute Resolution 786.

¹¹ *Ibid.*

¹² Hang 'ODR Systems' *Santa Clara LR* 41(2001)854.

¹³ Morek, 'Regulation of Online Dispute Resolution: Between Law and Technology', 21 at www.odr.info/cyberweek/Regulation%20of%20ODR_Rafal%20Morek.doc, accessed 25 August 2016.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Negi *op cit* 6.

Since it keeps the costs for resolving disputes to a minimum, online arbitration may prove to be the only realistic option to resolve disputes on low-value goods and services.¹⁷ Online arbitration's ability to keep costs low does not only pertain to the financial costs of the proceeding, but also to the opportunity costs involved, as it allows the parties to carry on with their business at home.¹⁸

Online arbitration also enables the parties to use their time more efficiently. Online arbitration service providers and online arbitration platforms are accessible at any time of the day, every day of the year.¹⁹ Due to the nature of e-commerce, where the online marketplace is open for 24 hours a day, 52 weeks of the year and for 365 days per year, online arbitration is especially well-suited for parties who live in different time zones, because it enables them to respond to new information and discuss new evidence in different times.²⁰ Online arbitration is additionally also particularly well-suited for e-commerce transactions as the transaction and payment would have been done online.²¹ It is also convenient because the submission of parties and evidence can be archived by means of an automated document management system which allows any document to be retrieved at any time.²² An online arbitration proceeding's turnaround time is also relatively short, because it circumvents the long extensions of time and postponement that occurs with litigation.²³

Since online arbitration makes use of both synchronous and asynchronous means of communication, the advantages of these also befalls online arbitration. Synchronous communication is real-time communication, such as Instant Messaging (IM) or Skype, and the fact that communication is instantaneous makes the communication experience similar to real life communication. With asynchronous communications information and documentation are not transmitted live, but can be written, reviewed, and then sent.²⁴ Asynchronous communications sometimes leads to better considered and better compiled contributions as parties are able to revisit and revise information before transmission.²⁵ This sometimes helps to resolve a dispute quicker as it lessens the potential for impulsive responses that often occur with traditional arbitration proceedings.²⁶

¹⁷ Gibbons *et al.* 'Frontiers of Law' *North Western Mutual LR* 32(2002)42.

¹⁸ *Ibid.*

¹⁹ Cahn *et al.* 'Dispute Resolution On-Line' *International Law* 32 (1998)977-978; Negi *op cit* 6.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ Morek 'Regulation of Online Dispute Resolution: Between Law and Technology' *op cit* 22.

²⁵ *Ibid.*

²⁶ Melamed 'Divorce Mediation and the Internet', s.p. at <<http://www.mediate.com/articles/melamed9.cfm>>, accessed 5 November 2016.

1.1.2. When is Online Arbitration Not Suitable?

Online arbitration will not be the best way to resolve a dispute that requires intense discussion and face-to-face communication.²⁷ The reason for this is that online arbitration cannot always measure up to the depth of face-to-face communication that is so vital to traditional negotiation and traditional mediation.²⁸ To a certain degree, online arbitration loses the social interaction dynamics of traditional arbitration as it occurs in virtual reality and in cyberspace over a graphic user interface (GUI).²⁹ Although IT helps reduce the physical distance between parties, the GUI imposes an 'electronic distance' on the proceeding as parties are not able to have direct interpersonal contact.³⁰ Interpersonal contact has always subconsciously been an important part of any ADR proceeding.³¹ The interpretation of body language, seemingly as insignificant as blushing, breaking out in cold sweat, a look of disbelief, looking down, stuttering, twitching, or winking, *etc.* play an important part in an ADR proceeding because these 'signs' are all subconsciously interpreted by the other party and the arbitrator as a form of communication and can be interpreted as indicators of guilt or innocence.³² The interpretation of body language between a legal representative and his/her client, such as picking up a clue by means of a wink or a light kick underneath a table, is unlike a verbal message, not easily transmittable over live streaming on the online arbitration platform and the other adversary party will as a result not be able to easily pick up on it.³³ In other words, GUI only gives a simulation of real life, and does not express the various pitches, tones and volumes of the parties and cannot transmit the more detailed nuances of personality or physical clues or indications.³⁴ This makes it difficult to construct an open conversation and to build confidence between the parties and between the parties and the online arbitrator.³⁵

Communication barriers of this nature also make it difficult to evaluate the strength of a party's feelings, and their confidence or flexibility on specific matters.³⁶ What exacerbates this situation is the very nature of e-commerce, because with most e-commerce disputes, the parties are unacquainted with each other and have never personally been involved with each other in real life.³⁷ Due to the nature of e-commerce, the parties usually also do not foresee a

²⁷ Morek 'Regulation of Online Dispute Resolution: Between Law and Technology' *op cit* 17.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Morek 'Regulation of Online Dispute Resolution: Between Law and Technology' *op cit* 18.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ Goodman *op cit* 21.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

future relationship, which is especially the case with low-value e-commerce disputes which usually arise out of a once-off transaction.³⁸ In many instances, the online arbitrator acts almost as a voice that is disembodied and this makes that s/he is not able to use his/her own physical personality to set the parties at ease or to create a corporeal environment that is conducive to resolve the dispute.³⁹ GUI limits the ability of the online arbitrator to exude his/her charisma, to accentuate wrongdoing and to make a professional interactive presentation of his/her finding.⁴⁰ Since the online arbitrator is not in the physical presence of the parties, s/he will also find it difficult to interpret body language, facial expressions, and verbal tone.⁴¹ Since online arbitration is a relatively new form of ADR, many traditional arbitration arbitrators still find it difficult or even impossible to translocate their expertise, knowledge and skills online.⁴²

Access to online computers and sufficient knowledge of IT may restrict access to some individuals, especially those of an older generation, who are not computer literate, but also those who live in parts of the world where computers and the Internet are not a part of everyday life.⁴³ As a result, parties who do not possess a high level of proficiency of computer skills and knowledge of IT or a relevant software application, may be at a disadvantage in terms of their opponents who may be more proficient than them, and this could easily impact on the outcome of a proceeding.⁴⁴ There are also many concerns pertaining to the confidentiality and security of the online communications made and presented during the proceeding.⁴⁵

1.2. The extent to which online arbitration is already possible and what obstacles still exist

Online arbitration is already possible under the *lex traditum arbitralis* that is regulated by the 'NY Convention', the 'Model Law on ICA', the 'Technical Notes' etc., as long as certain legal and technical requirements are met. Online arbitration however has such unique features that leads to so many legal and technical challenges that UNCITRAL would have to compile a set of legal standards that is especially just focused on how an online arbitration proceeding should be conducted and which could lay down the standards on how IT should

³⁸ Morek 'Regulation of Online Dispute Resolution: Between Law and Technology' *op cit* 19.

³⁹ Katsh *et al.* 'E-Commerce, E-Disputes, and E-Dispute Resolution' *Ohio State Journal on Dispute Resolution* 15(2000)714.

⁴⁰ Beal 'Online Mediation' *Ohio State Journal on Dispute Resolution* 15(2000)737.

⁴¹ Katsh *et al.* 'E-Commerce, E-Disputes, and E-Dispute Resolution' *op cit* 714.

⁴² Eisen 'Are We Ready for Mediation in Cyberspace?' *Brigham Young University LR* (1998)1308.

⁴³ Goodman *op cit* 21.

⁴⁴ *Ibid.*

⁴⁵ Katsh 'Dispute Resolution in Cyberspace' *Connecticut LR* 28(1996)971; Katsh 'Law in a Digital World' *Villanova LR* 38(1993)415; Lodder *et al.* 'Developing an ODR Environment' *Harvard Negotiation LR* 10(2005) 302; Morek 'Regulation of Online Dispute Resolution: Between Law and Technology' *op cit* 20.

be incorporated into such a proceeding in such a manner that the outcome will be deemed by a national court to be legally valid.

An online arbitration proceeding and its award is legally valid within the current traditional international commercial arbitration legal framework, but then certain legal requirements have to be met, and due to the technical nature of such a proceeding, this is not always too easy.⁴⁶ Online arbitration still encounters, numerous difficulties, uncertainties and impossibilities in the application of principles of traditional arbitration law.⁴⁷

The majority of the challenges pertain to formal legal requirements that WG.III had to overcome while it was trying to compile the 'DPR', but over time, many of these challenges have been surmounted to a large extent, or could still be easily surmounted in future when UNCITRAL decides to revisit the 'Technical Notes' or to compile a set of legal standards that is exclusively focused on online arbitration.

As will be pointed out in the thesis, such legal requirements come in various forms, ranging from the requirement that an arbitration agreement has to be in writing, the requirement that an arbitration agreement needs to be authentically signed by the parties, to the requirement of original documentation and the presentation of actual evidence.⁴⁸ In addition, traditional arbitration law, such as the South African Arbitration Act 42 of 1965, article 15(1), makes no provision for the incorporation of IT during a proceeding and entitles all parties as well as the arbitrator to all be physically present at the same venue at the same time to conduct an arbitration proceeding.⁴⁹ Online arbitration however makes it possible for the all parties as well as the arbitrator to all be virtually present at the different venues at different times to conduct an arbitration proceeding. Many legal uncertainties exist in terms of the choice of law of the e-commerce transaction and the choice of law for the resolution of the e-commerce dispute, the procedural and evidential rules pertaining to the online arbitration proceeding. It is difficult to determine jurisdiction in cyberspace and the seat of an online arbitration proceeding, as well as to determine the legal position of an online arbitration proceeding that floats in cyberspace, in addition to the validity of floating online arbitration awards. The revised 'Technical Notes' or new set of legal standards needs to focus on the legal requirements for fair and efficient online arbitration to ensure that a proceeding is independent, transparent and also with regards to the authenticity of online documents, especially when it comes to the requirements for electronic signatures. Many challenges exist when it comes to the enforcement of online arbitration awards and this aspect requires UNCITRAL's attention as soon as possible.

⁴⁶ Morek 'Online Arbitration' *op cit* 44.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ SA Arbitration Act 42 of 1965, article 15(1).

Not only does the legal requirements present challenges, but also the technical aspects. Most notably, the Internet has its own technical requirements as it is a technical self-regulatory framework. These distinct technical characteristics of the Internet have their own bearing on online arbitration. It will also be pointed out that the transcendental character of the Internet has, from a technical perspective, consequences for determining jurisdiction and applicable law in cyberspace. Online arbitration also has its own technical requirements that need to be taken care of and special attention should be paid to prevent high speed communication in online arbitration from undermining the requirement of due process. The interrelationship between the confidentiality of the online arbitration proceeding and the publication of the outcome of the proceeding is also important. In addition, online communication should be secured and information should be managed and stored safely. All of this requires UNCITRAL to compile further standards in addition to the 'Technical Notes' that is more focused on online arbitration.

The thesis will argue that whenever UNCITRAL decides to revisit the 'Technical Notes' or to compile a set of legal standards that is exclusively focused on the legal requirements of online arbitration, such as (1) the OADR procedure; (2) the global OADR framework, with a focus on both the relevant roleplayers and the components of such a framework; (3) the relevant legal principles; (4) the design of OADR proceedings; (5) the regulation of neutral third parties; (6) the finer points in the OADR proceeding; (7) the enforcement of decisions; and on the regulation of the following technical requirements: (1) the certification of service providers; (2) incentives for users; (3) the relationship between the OADR service provider and the ODR platform, as well as (4) a technical enforcement protocol, IT will be of great assistance to conduct arbitration proceedings, ranging from the transmission of online communications, the conducting of hearings, the facilitation of negotiations between parties, the online presentation of evidence, making of submissions, the giving of online testimonies of witnesses and expert witnesses, to very unique problem-solving IT software that recommends solutions, as will be seen in the case study of how eBay and PayPal's Dispute Resolution Centres' websites' work.

Matters that are of particular importance, is the place of arbitration and the place where the online arbitration award is made, because online arbitrations are delocalised and online arbitration tribunals have no real physical seat, and this consequently has a big effect on the enforcement of the award.⁵⁰ An online arbitration system will be most efficient when agreements and awards could be enforced automatically and if incentives are provided to adhere with such awards, *etc.*

⁵⁰ Morek 'Online Arbitration' *op cit* 44.

This thesis does not regard online arbitration as being traditional arbitration's rival or contender. Online arbitration schemes make up a new dimension of the spectrum of arbitration, and for the moment it still shares in some important aspects, the same legal framework as traditional arbitration, until UNCITRAL either revisits the 'Technical Rules' or compile a set of legal standards that is exclusively focused on online arbitration.

At the same time, it is however also important to look at the main reasons why online arbitration hasn't realised its full potential yet, so that UNCITRAL can address what is needed to be done to bring down the barriers to online arbitration.

Of all factors impeding on the growth of online arbitration, a lack of awareness is probably the most important one; a lack of awareness that online arbitration exists, or if someone is aware that it exists, not knowing exactly how online arbitration works or how to initiate the process.⁵¹

A second factor that impedes the development of online arbitration is the current lack of legal principles, procedures and standards and an accreditation agency that is specifically focused on online arbitration and not just on OADR in general, such as the 'Technical Notes'.⁵²

Another impediment is the fact that generic software will not help realise the full potential of online arbitration. Generic software does not help to identify logarithms underlying a given dispute and compare it to the logarithms of previous disputes to help devise an answer, as is the case with the software that eBay and PayPal's Dispute Resolution Centres' websites' uses. Without such advanced software, the intervention of an online arbitrator is still required.⁵³

Another reason why online arbitration did not quite manage to get-off the ground is because of a lack of incentives to participate.⁵⁴

The lack of enforceability of online arbitration agreements and awards is also still an impediment to online arbitration.⁵⁵

2. THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK PERTAINING TO TRADITIONAL ARBITRATION AND ONLINE ARBITRATION

Although there is at this time no international legal framework devised exclusively for online arbitration, but only for OADR in general, online arbitration disputes are currently still adjudicated by online arbitration service providers

⁵¹ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *Maastricht Journal of European and Comparative Law* 1(2014)5 at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414098>, accessed 5 November 2016.

⁵² Cortés 'Developing ODR for Consumers in the EU' *International Journal of Law and IT* 19(1)(2010) 1–4.

⁵³ Rabinovich-Einy 'Technology's Impact' *Harvard Negotiation LR* 11(2006)253.

⁵⁴ Edwards *et al.* 'Creating Trust and Satisfaction Online' *Web Journal of Current Legal Issues* (2007)5.

⁵⁵ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 7.

according to the rules that regulates traditional arbitration in addition to the 'Technical Notes'.⁵⁶ Due to online arbitration's special characteristics, it is very important that UNCITRAL revisits the 'Technical Notes' or compile a set of legal standards exclusively focused on online arbitration to specifically.⁵⁷ This research will therefore look at what extent the 'Technical Notes' regulates OADR and online arbitration, and where the pitfalls and challenges still lies and whether the 'Technical Notes' as it currently stands in its unpublished version, will adequately accommodate online arbitration's distinctive characteristics.

2.1. *Supra-National Legislation and Guidelines*

The current universal legal traditional and online arbitration framework consists of a patchwork of *supra*-national instruments that relates to OADR, traditional arbitration as well as national legislation and case law. On the *supra*-international level, three sources have bearing on online arbitration, even though they are not exclusively focused on online arbitration. These three *supra*-international legal sources range from powerful legal sources such the 'NY Convention', to the 'Model Law on ICA' to the non-binding, descriptive 'Technical Notes' that regulates OADR in a guideline format. Most national legislation has been revised to accommodate the 'NY Convention' and the 'Model Law on ICA of 1985', but not by all countries.⁵⁸

2.1.1. 'NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958'

The starting point for both traditional arbitration and online arbitration is the 'NY Convention', because it is this 'Convention' that ultimately allows arbitration awards to be recognised in other legal jurisdictions and which enforces arbitration awards in other legal jurisdictions.

The 'NY Convention' compels domestic courts of the signatory states to recognise and to give effect to an international arbitration award when all of the requirements for a legally valid arbitration award have been met.⁵⁹ It does not only regulate arbitration awards as such, it also sets out the requirements that a traditional arbitration procedure should meet before its arbitration award will be legally valid and recognised and consequently enforced.

If an online arbitration award does not meet these requirements, then it cannot be recognised and enforced.⁶⁰

⁵⁶ Prendes *op cit* 14.

⁵⁷ *Ibid.*

⁵⁸ Prendes *op cit* 14.

⁵⁹ UNCITRAL 'NY Convention (1958)' *op cit.*

⁶⁰ Prendes *op cit* 14.

2.1.2. The 'Model Law on ICA of 1985/2006'

UNCITRAL compiled the 'Model Law on ICA', to assist states to modernise and harmonise their national legislation on traditional arbitration. It therefore covers all the aspects related to the arbitration process, from the arbitration agreement to the arbitration award, *etc.*⁶¹ although it makes no mention of online arbitration.⁶²

The 'Model Law on ICA' attempts to standardise and harmonise the national legislation from legal jurisdictions across the world with respect to arbitration in such a manner that it will offer greater legal certainty to parties involved in international arbitration.⁶³

Although the 'Model Law on ICA' was specifically compiled for international commercial arbitration,⁶⁴ some countries have decided to adopt it with minor adaptations for both domestic and international arbitration.⁶⁵

The 'Model Law' is however not a binding instrument, and is categorised as 'soft law'. Since most UN member states have amended their national legislation to conform to the 'Model Law', it has succeeded in almost standardising the legislation on traditional arbitration in most signatory states.

Online arbitration makes use of the 'Model Law' because it was specifically designed to regulate arbitration, but since it does not regulate the legal and technical requirements of online arbitration, other legal sources also need to be consulted during an online arbitration proceeding.⁶⁶

2.1.3. 'UNCITRAL Technical Notes on ODR of 2016'

At UNCITRAL's 43rd Session that was held in NY on 21 June until 9 July 2010, UNCITRAL agreed that WG.III should be established to undertake work in the field of OADR that relates to cross-border e-commerce transactions, including B2C and B2B.⁶⁷

At WG.III's 22nd Session, Working Group III requested that the Secretariat prepare 'DPR' for disputes resulting from B2C and B2B, cross-border, low-value e-commerce transactions.⁶⁸

⁶¹ UNCITRAL 'NY Convention (1958)' *op cit*.

⁶² Prendes *op cit* 15.

⁶³ *Ibid*.

⁶⁴ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit*, article 1(3).

⁶⁵ Ramsden *op cit* 19; Butler, Finsen *op cit* 298 – 299.

⁶⁶ *Ibid*.

⁶⁷ UNCITRAL 'Report of 44th Session (A/66/17)', par.218 at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V11/846/34/PDF/V1184634.pdf?OpenElement>>, accessed 5 November 2016.

⁶⁸ WG.III 'ODR for Cross-Border E-Commerce Transactions' (22nd Session, A/CN.9/WG.III/WP.105)' *op cit* par.24-par.27.

At WG.III's 26th Session that was held in Vienna on 5 November until 9 November 2012, WG.III identified that 'Two Tracks' in the 'DPR' might be required in order to accommodate legal jurisdictions in which arbitration agreements concluded before a dispute arise are considered binding on online consumers, as well as legal jurisdictions where pre-dispute arbitration agreements are not considered binding on online consumers.⁶⁹

At WG.III's 27th Session that was held in NY on 20 May until 24 May 2013, WG.III considered a proposal to implement a 'Two-Track' system, with one track which would end in a binding arbitration phase, the so-called 'Track I', and one track of which would not, the so-called 'Track II'. It also considered the draft text of Track I of the 'DPR'.⁷⁰

At WG.III's 28th Session and its 29th Session, Working Group III considered the draft text of 'Track II'.⁷¹

At WG.III's 30th Session that was held in Vienna on 20 until 24 October 2014, WG.III addressed the text of 'Track I' and also reported that despite strenuous efforts from all the delegations to reach consensus, fundamental differences between states that allowed binding pre-dispute agreements to arbitrate and those that do not remained, and that further progress on the 'DPR' would require WG.III to find ways to bridge those differences.⁷²

At UNCITRAL's 48th Session that was held in Vienna on 29 June until 16 July 2015, UNCITRAL instructed WG.III to continue its work towards elaborating a non-binding descriptive document reflecting elements of an OADR process, on which elements WG.III had previously reached consensus, excluding the question of the nature of the final stage of the OADR process, namely whether it should include arbitration or not.⁷³ WG.III was also given a time limit of one year or no more than two Working Group sessions, after which the work of WG.III would come to an end, irrespective of whether or not a result had been achieved.⁷⁴

At WG.III's 32nd Session, which was held in Vienna on 30 November until 4 December 2015, WG.III discussed a draft outcome document on the basis of

⁶⁹ WG.III 'Report of 26th Session (A/CN.9/762)', par.13-par.25 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V12/575/04/PDF/V1257504.pdf?OpenElement>>, accessed 5 November 2016.

⁷⁰ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit s.p.*

⁷¹ WG.III 'Report of 28th Session (A/CN.9/795)' *op cit.*; WG.III 'Report of 29th Session (A/CN.9/801)' *op cit s.p.*

⁷² WG.III 'Report of 30th Session (A/CN.9/827)' at <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V14/051/36/PDF/V1405136.pdf?OpenElement>>, accessed 5 November 2016.

⁷³ UNCITRAL 'Report of 48th Session (A/70/17)', par.352 at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/054/52/PDF/V1505452.pdf?OpenElement>>, accessed 24 November 2016.

⁷⁴ *Ibid.*

several proposals made at that Session.⁷⁵ Several proposals for specific parts or provisions of the outcome document remained to be discussed, and it was agreed to defer the consideration thereof to the next Session.⁷⁶ It was also agreed, at the 32nd Session, that WG.III would finalise the draft outcome document at the next session.⁷⁷

At Working Group III 33rd Session, WG.III met for one last time to complete the 'Technical Notes' according to the revised UNCITRAL mandate.⁷⁸ Since no consensus could be reached on the nature of the 'DPR', the 'Draft Technical Notes' was instead submitted to UNCITRAL for its acceptance.⁷⁹

At UNCITRAL's 49th Session that was held in NY from 27 June until 15 July 2016, UNCITRAL adopted the final version of the 'Technical Notes on ODR of 2016' on 5 July 2016.⁸⁰

In terms of the 'Technical Notes', Section IV, article 22, an OADR process may be particularly useful for disputes arising out of cross-border, low-value e-commerce transactions.⁸¹ Article 22 also states that an OADR process may apply to disputes arising out of both a B2C as well as B2B transactions.⁸² Article 23 states that an OADR process may apply to disputes arising out of both sales and service agreements.⁸³

In terms of the 'Technical Notes', Section III, article 18, the process of an OADR proceeding may consist of three phases: the Negotiation Phase, the Facilitated Settlement Phase and a Third or Final Phase.⁸⁴

Since the 'Technical Notes' is more focused on OADR and not *per se* on online arbitration, many legal uncertainties still persist which UNCITRAL would still have to address when they revisit the 'Technical Notes' or decide to compile a set of legal standards exclusively focused on online arbitration. Answers still need to be given on a range of legal and technical aspects, such as:

- whether decisions made in terms of the 'Technical Notes' be enforceable under the 'NY Convention',⁸⁵

⁷⁵ WG.III 'Report of 32nd Session (A/CN.9/862)' at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V15/089/16/PDF/V1508916.pdf?OpenElement>>, accessed 24 November 2016.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ WG.III 'Report of 33rd Session (A/CN.9/868)', s.p. at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/014/73/PDF/V1601473.pdf?OpenElement>>, accessed 22 October 2016.

⁷⁹ WG.III 'Report of 33rd Session (A/CN.9/868)' *op cit* s.p.

⁸⁰ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section V.

⁸¹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section IV, article 22.

⁸² *Ibid.*

⁸³ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section IV, article 23.

⁸⁴ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section III, article 18.

⁸⁵ Kirgis *op cit* 1; WG.III 'DPR (A/CN.9/WG.III/WP.133)' p.2-3 at <http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.htm>, accessed 15 August 2015.

- the suitability of a single neutral third party who have served in both or in either the Negotiation Phase and the Facilitated Settlement Phase to also serve in the Final Phase, *etc.*⁸⁶

2.2. National legislation

Besides the one UN instrument and the two UNCITRAL instruments, the regulation of traditional arbitration relies greatly on national legislation.⁸⁷ It is therefore always important to scrutinise the national legislation of the legal jurisdiction where the successful party intends to enforce an award in an attempt to determine whether it is a legally valid arbitration award.⁸⁸

In the SA context, the 'SA Constitution of 1996', the 'SA Arbitration Act 42 of 1965', the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977', the 'SA Electronic Communications and Transactions Act (ECTA) 25 of 2002', SA case law and SA common law are all relevant.⁸⁹ The legislation that preceded the 'UK's Arbitration Act 23 of 1996' forms the basis of current SA legislation, while the UK's case law is of persuasive relevance.⁹⁰

2.2.1. 'SA Constitution of 1996'

The 'SA Constitution', article 34 states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.⁹¹

According to the SA Supreme Court of Appeal in *Total Sport Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* consensual arbitration is not a departure from the requirements of the 'SA Bill of Rights' if the parties themselves decide to freely and consensually accept that the normal principles governing arbitration apply, namely that the arbitration award will be final and binding without a right of appeal.⁹²

In this respect, the 'SA Constitution', article 33 makes provision for the right to just administrative action by declaring that (1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair.⁹³ (2) Everyone whose rights have been adversely affected by administrative action

⁸⁶ Kirgis *op cit* 1; WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* p.2-3.

⁸⁷ Butler, Finsen *op cit* 4-8; Ramsden *op cit* 19-22.

⁸⁸ Butler, Finsen *op cit* 4-8; Ramsden *op cit* 18.

⁸⁹ Ramsden *op cit* 13-18; Butler, Finsen *op cit* 4-8.

⁹⁰ Ramsden *op cit* 22-24; Butler, Finsen *op cit* 4-8.

⁹¹ 'SA Constitution of 1996', article 34; Ramsden *op cit* 16.

⁹² *Total Sport Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA); Ramsden *op cit* 16.

⁹³ 'SA Constitution of 1996', article 33(1); Ramsden *op cit* 16.

has the right to be given written reasons.⁹⁴ (3) National legislation must be enacted to give effect to these rights, and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;⁹⁵ (b) impose a duty on the state to give effect to the rights in sub-sections (1) and (2);⁹⁶ and (c) promote an efficient administration.⁹⁷

According to Goldstone JA of the Labour Appeal Court of SA in *Amalgamated Clothing and Textile Workers Union of SA v Veldspun (Pty) Ltd*, the nature of the power of the arbitrator in consensual arbitrations does not amount to administrative action, as intended in the 'SA Constitution', article 33(1), but is instead judicial in nature and arises from the exercise of private, rather than public, powers.⁹⁸

As stated before, the 'SA Constitution', article 34 makes provision for the right of access to the courts by declaring that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.⁹⁹ Kroom JA of the Constitutional Court held in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* that article 34 does not fit the conception of private arbitration as it is clear that a private arbitration is not a court; private arbitration proceedings do not, and, if international practice is to be accepted, should not require public hearing.¹⁰⁰ At the same time private arbitrators need not, as long as parties knowingly accept this, always be independent.¹⁰¹

The effect of the wording of the 'SA Constitution' with regards to consensual arbitration is that a person choosing private arbitration for the resolution of a dispute is therefore not that they have waived their rights under article 34.¹⁰² Such a person has instead chosen not to exercise their right in terms of article 34.¹⁰³

According to the Constitutional Court in this case, the fact that article 34 does not apply to arbitration does not mean that fairness is not a requirement of arbitration.¹⁰⁴ In the Roman Dutch law, which constitutes SA common law, it was accepted by Voet that a submission to arbitration was subject to an implied

⁹⁴ 'SA Constitution of 1996', article 33(2); Ramsden *op cit* 16.

⁹⁵ 'SA Constitution of 1996', article 33(3)(a); Ramsden *op cit* 16.

⁹⁶ 'SA Constitution of 1996', article 33(3)(b); Ramsden *op cit* 16.

⁹⁷ 'SA Constitution of 1996', article 33(3)(c); Ramsden *op cit* 16.

⁹⁸ 'SA Constitution of 1996', article 33(1); *Amalgamated Clothing and Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A); Ramsden *op cit* 16.

⁹⁹ 'SA Constitution of 1996', article 33(4); Ramsden *op cit* 16.

¹⁰⁰ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC); 'SA Constitution of 1996', article 33(4); Ramsden *op cit* 16-17.

¹⁰¹ *Ibid.*

¹⁰² 'SA Constitution of 1996', article 34; Ramsden *op cit* 17.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

condition that the arbitrator should proceed fairly or, as it is sometimes described, according to law and justice.¹⁰⁵ The recognition of such an implied condition of fairness fits neatly with SA's constitutional values. When an arbitrator interprets an arbitration agreement, s/he should ordinarily accept that when parties voluntarily submit to arbitration, they in fact submit to a process that they envisioned to be performed fairly.¹⁰⁶

2.2.2. 'SA Arbitration Act 42 of 1965'

According to its preamble, the 'SA Arbitration Act' makes provision for the resolution of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals.

The 'SA Arbitration Act' however has no international scope and only regulates domestic arbitration.

With regards to the application of the 'SA Arbitration Act', article 39 makes provision for its application to arbitration proceedings where the state is a party, but not where the dispute is between the state and another government.¹⁰⁷

Article 40 makes provision for the 'Act' to also be applicable to arbitrations that are mandated by other national legislation.¹⁰⁸ Other legislation, such as domestic expropriation legislation and labour legislation, repeatedly makes provision for disputes to be resolved by arbitration.¹⁰⁹

2.2.3. 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'

In 1976, SA ratified the 'NY Convention'.¹¹⁰ The 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977' was promulgated the following year to give effect to the provisions of the 'NY Convention'. Therefore, the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act' makes provision for foreign arbitration awards to be recognised as an order of a SA court and executed as such.¹¹¹ It also regulates how an application should be made for an arbitration award to be effectuated an order of court and also stipulates when an order of court may be refused to be executed.¹¹²

¹⁰⁵ Ramsden *op cit* 17.

¹⁰⁶ *Ibid.*

¹⁰⁷ 'SA Arbitration Act 42 of 1965', article 39; Ramsden *op cit* 14-15; Butler, Finsen *op cit* 4-8.

¹⁰⁸ 'SA Arbitration Act 42 of 1965', article 40; Ramsden *op cit* 14-15; Butler, Finsen *op cit* 4-8.

¹⁰⁹ Ramsden *op cit* 14-15; Butler, Finsen *op cit* 33-34.

¹¹⁰ Ramsden *op cit* 18; Butler, Finsen *op cit* 229-300.

¹¹¹ Butler, Finsen *op cit* 313-316.

¹¹² Butler, Finsen *op cit* 314-315.

The 'NY Convention' is a calculated attempt to make sure that parties may enjoy the same advantages with the outcome of consensual arbitration as private litigants with the outcome of a court decision.¹¹³

2.2.4. 'SA Act on Electronic Communications and Transactions (ECTA) 25 of 2002'

The 'SA ECTA 25 of 2002' creates a regulatory platform to enable e-commerce and online communications in SA.¹¹⁴ The 'SA ECTA' was required as the legislature realised that the Internet has permanently altered the way in which communication takes place.¹¹⁵ Since future generations will conduct themselves in an ever-increasing digital manner and also because the electronic signature is a critical component when an individual is required by law to sign electronically legal certainty was required.¹¹⁶

The 'SA ECTA' regulates online communications and transactions; makes provision for the development of a national e-strategy for SA; promotes universal access to online communications and transactions and the use of e-commerce transactions by SMME's; makes provision for human resource development in e-commerce transactions; prevents abuse of information systems and encourages the use of e-government services.¹¹⁷

2.2.5. SA Case Law

In common law legal systems, the *stare decisis* rule of authority or precedent is a rule that dictates that a legal principle or legal rule that was established in a previous legal case, is either of a binding nature on, or of a persuasive nature for a court or another tribunal whenever subsequent cases with similar issues or facts are to be adjudicated.¹¹⁸ All common law legal systems emphasise that cases should be decided according to consistent and principled rules so that analogous facts will lead to analogous and predictable outcomes.¹¹⁹ To this effect, a precedent is a rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases.¹²⁰

¹¹³ Butler, Finsen *op cit* 229-300.

¹¹⁴ Swales 'The Regulation of Electronic Signatures' 13(2) *SALJ* 257-258.

¹¹⁵ Swales *op cit* 258.

¹¹⁶ Jacobs 'ECTA' *SA Mercantile LJ* 16 (2004) 556.

¹¹⁷ 'SA ECTA 25 of 2002', Preamble; Eiselen 'Fiddling with ECTA' *Potchefstroom Electronic LJ* 17(6) (2014)

2.

¹¹⁸ Bryan *et al. Black's Law Dictionary* 1059.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

Since the *stare decisis* rule binds SA judges, adjudicators, neutral third parties and arbitrators to previous SA decisions made by courts and tribunals that are superior to their own, reference to SA case law will frequently be made throughout this research.¹²¹

In reality, precedents are only persuasive as parties can decide to an arbitration that departs from the applicable law.

2.2.6. SA Common Law

Most of the areas of arbitration that was regulated by common law have since been superseded by legislation.¹²²

The application of the common law on arbitration has been restricted in SA as three provinces of the Union of SA adopted, with some variation, the 'UK's Arbitration Act of 1889, c-49', that has the result that British case law on arbitration was and still is, authoritative in domestic SA courts as so much of the current SA legislation in this regard is based on British legislation.¹²³

Even though these provincial ordinances were repealed when the 'SA Arbitration Act 42 of 1965' was promulgated, their influence still remains.¹²⁴ Whenever a conflict of law between the 'SA Arbitration Act 42 of 1965', and SA common law, which is Roman Dutch law with principles that are adopted from English law, occurs, the 'SA Arbitration Act' changes the common law, but never more than what is deemed necessary.¹²⁵

Although, according to the Witwatersrand (Transvaal) Local Division in *Anshell v Horwitz*, the SA courts may generally appear to deem the arbitrator as the 'master of his [her] own procedure', s/he must nonetheless observe the rules of natural justice when performing the proceedings.¹²⁶ According to the Cape Provincial Division in *Kannenberg v Gird*, whenever an arbitrator has conducted the proceedings in a way that did not observe the fair administration of justice between the parties, the court will intervene.¹²⁷

During the decision-making process, the rules of natural justice will largely be observed if the arbitrator always bear three common law rules in particular in mind, namely the *audi alteram partem* rule, which means that the other side to a dispute must also be heard, the *nemo iudex idoneus in propria causa estrule*, which means that no one is fit to be judge in her/his own case and the rule that justice must be seen to be done.¹²⁸

¹²¹ Ramsden *op cit* 22; Butler, Finsen *op cit* 24.

¹²² Ramsden *op cit* 13; Butler, Finsen *op cit* 164-165.

¹²³ Butler, Finsen *op cit* 4-8, 165; Ramsden *op cit* 13.

¹²⁴ Ramsden *op cit* 13; Butler, Finsen *op cit* 4-8.

¹²⁵ *Ibid.*

¹²⁶ *Anshell v Horwitz* 1916 WLD 65; Butler, Finsen *op cit* 165; Ramsden *op cit* 13.

¹²⁷ *Kannenberg v Gird* 1966 (4) SA 173(C); Butler, Finsen *op cit* 165; Ramsden *op cit* 96.

¹²⁸ Butler, Finsen *op cit* 4-8, 165; Ramsden *op cit* 13.

2.2.7. 'United Kingdom's Arbitration Act 23 of 1996'

The previous SA Provincial Ordinances on arbitration were based solely, and the current 'SA Arbitration Act' to a large extent, on the UK's arbitration legislation of the time and consequently SA arbitration legislation has accordingly been greatly influenced by the UK's case law on the UK's legislation of the time.¹²⁹

SALC has as recently as 2001 recommended that SA arbitration legislation continues with this trend and consequently, it can be anticipated that future SA arbitration legislation will remain to be based to a large extent on the UK's arbitration legislation, and more specifically, the current 'UK Arbitration Act 23 of 1996'.¹³⁰

According to 'UK Arbitration Act's, Preamble, the principal purpose of this 'Act' is to reinstate and improve the law that relates to arbitration in accordance with the arbitration agreement.¹³¹ The 'UK Arbitration Act 23 of 1996' is not based on the 'Model Law on ICA of 1985'.¹³²

2.2.8. International Case Law

SA judges and adjudicators are not bound by the *stare decisis* rule to decisions made by overseas courts or tribunals.¹³³

However, where the legislation or law that needs to be interpreted is similar to overseas legislation and to the relevant facts of a given case, SA judges and adjudicators view overseas judgments on given cases with similar facts, especially British judgments, for the reasons given above, as having strong persuasive influence.¹³⁴

This is especially even more the case when courts or arbitrators deal with arbitration law which is by its nature international.¹³⁵

Consequently, references to American, EU and British case law, as well as that of other common law jurisdictions and the case law of many of SA's largest partners in FDI and trade will be made.

¹²⁹ Ramsden *op cit* 22; Butler, Finsen *op cit* 4–8.

¹³⁰ SALC 'Domestic Arbitration Report' May 2001; Ramsden *op cit* 22.

¹³¹ 'UK Arbitration Act 23 of 1996'; Ramsden *op cit* 22.

¹³² *Ibid.*

¹³³ Ramsden *op cit* 22 – 23; Butler, Finsen *op cit* 4–6.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

3. THE DIFFERENCE BETWEEN ONLINE ARBITRATION AND TRADITIONAL ARBITRATION

It was stated at the outset that there exists no distinct set of legal standards that exclusively regulate online arbitration as distinct from traditional offline arbitration; the 'Model Law on ICA' is focused on traditional arbitration, while the 'Technical Notes' is more focused on OADR and not on online arbitration *per se*.¹³⁶

One can therefore assume that online arbitration is still to a large extent subjected to the same legal principles, procedures and standards as traditional arbitration and OADR.¹³⁷ This will be the case until UNCITRAL revisits the 'Technical Notes' or decides to compile a set of legal standards that is exclusively focused on online arbitration.

Online arbitration differs from traditional arbitration as both the arbitration agreement and the online arbitration proceeding itself are conducted online *in toto* for the larger part.¹³⁸ Although online arbitration is increasingly being used between online merchants and online buyers in B2C relationships, it is also employed in B2B relationships and as a result the aforementioned principles of consumer law and commercial arbitration apply *mutatis mutandis*.¹³⁹ Online arbitration produces the same legal results as traditional arbitration despite the fact that the online arbitration regime or *lex electronica arbitralis* is not as well-developed as the traditional arbitration regime. For the moment, online arbitration still has to adjust to a few legal and technical aspects of traditional arbitration and OADR techniques and procedures as the 'Technical Notes' do not address these aspects.¹⁴⁰ As long as online arbitration service providers inform parties at great length about their rights and provide them with all of the required information, and as long as the online arbitration proceeding is effective, fair, independent and transparent the outcome of an online arbitration proceeding will have the same legal validity than the outcome of a traditional arbitration proceeding.¹⁴¹ In other words, if an online arbitration proceeding adheres to the due process requirements of a proceeding and help to protect the

¹³⁶ Bantekas *An Introduction to International Arbitration*, p.267 at <https://books.google.co.za/books?id=sc8_CgAAQBAJ&pg=PA267&lpg=PA267&dq=It+is+assumed+a+priori+that+online+arbitration+is+subject+to+the+same+legal+principles+as+its+offline+counterpart&source=bl&ots=EKB8NLk3M8&sig=LzvGI4fUxumsp-d9ODuXuTiROI&hl=en&sa=X&ved=0ahUKEwjdsrHtiabQAhVqIMAKHXUHA9sQ6AEIGTAA#v=onepage&q=It%20is%20assumed%20a%20priori%20that%20online%20arbitration%20is%20subject%20to%20the%20same%20legal%20principles%20as%20its%20offline%20counterpart&f=false>, accessed 11 November 2016.

¹³⁷ Bantekas *op cit* 267.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

rights of the parties, especially the rights of the weaker consumer, there is no reason why the online arbitration award cannot be recognised and enforced.¹⁴²

When it comes to the clear difference between online arbitration and traditional arbitration the line is increasingly blurring in practice; both types of arbitration use the same legal rules and regulations, most notably the 'NY Convention' and the 'Model Law on ICA' and relevant national legislation.¹⁴³

The main difference between online arbitration and traditional arbitration is that with the former, either the entire or greater part of the proceeding is conducted online. With the latter, the greater part is conducted offline.

4. CONCLUSION

There is nothing in the current international legal framework that prevents parties from instituting an online arbitration proceeding.¹⁴⁴ Since the unique features of online arbitration necessitate unique legal and technical requirements, these requirements will be best resolved by a special set of regulations drafted especially for online arbitration, because the 'NY Convention', the 'Model Law on ICA' and the 'Technical Notes' are either focused on traditional arbitration or on OADR. When UNCITRAL decides to revisit the 'Technical Notes' or to compile a set of legal standards that is exclusively focused on online arbitration, it would have to focus on the further regulation of the following legal aspects: (1) the OADR procedure; (2) the global OADR framework, with a focus on both the relevant roleplayers and the components of such a framework; (3) the relevant legal principles; (4) the design of OADR proceedings; (5) the regulation of neutral third parties; (6) the finer points in the OADR proceeding; (7) the enforcement of decisions.

UNCITRAL would also have to focus on the regulation of the following technical aspects: (1) the certification of service providers; (2) incentives for users; (3) the relationship between the OADR service provider and the ODR platform, as well as (4) a technical enforcement protocol.

From a legal perspective, the online arbitration paradigm differs so greatly from the traditional arbitration paradigm that it requires answers on legal *lacunae*, greater legal clarity and ultimately a *lex electronica arbitralis* focused on all of the legal and technical aspects pertaining to solely online arbitration.¹⁴⁵

The regulations for traditional arbitration are for the greater part, applicable to online arbitration, but it is nonetheless necessary to create a specifically designed set of legal standards exclusively for online arbitration. There are highly complex legal and technical loopholes and problems with the

¹⁴² Bantekas *op cit* 267.

¹⁴³ Schmitz "Drive-Thru' Arbitration in the Digital Age' *Baylor LR* 3(6)(2010)187; JAMS 'Resolving Disputes Worldwide', s.p. at <<https://www.jamsadr.com/>>, accessed 21 October 2016.

¹⁴⁴ Prendes *op cit* 7; Marriot *et al. op cit* 2-011–2-015.

¹⁴⁵ Bantekas *op cit* 267.

formalities of the validity of online contracting which need to be clarified by the courts as well as the legislative bodies of the signatory states to international instruments that regulate arbitration.¹⁴⁶

Besides it being a legal and technical necessity, it would also be more practical to create a specially designed legal and technical framework for online arbitration. Such a legal and technical framework should at least regulate the requirements pertaining to the serving of a notice of the institution of a proceeding, the use of technology in the online arbitration proceeding, recognise the validity of online documents and electronic signatures, and effectively attend to any other matter that may come to pass from the use of online means of communication before and during the online arbitration proceeding.

¹⁴⁶ Schellekens 'Online Arbitration and E-Commerce' *Electronic Communication* LR 9(2002)125.

CHAPTER 3:

THE ONLINE ARBITRATION PROCEEDING

1. INTRODUCTION

In this chapter, the main characteristics of an effective online arbitration proceeding will be evaluated. The requirements for a legally valid online arbitration agreement will be looked at. Secondly, the procedural rules pertaining to the online arbitration proceeding will be looked at, especially the admissibility of evidence. Thirdly, the choice of law of the transaction and the choice of law for the resolution of the dispute are important. Thereafter, the rendering of the online arbitration award and the enforcement procedure will be looked at.

1.1. The Requirements of the Online Arbitration Agreement

Before an online arbitration proceeding can start, the parties will have to conclude an online arbitration agreement, instead of the conventional paper-based format arbitration agreement so typical of traditional arbitration; this is however the start of many of online arbitration's legal challenges.

The 'NY Convention', article II(1) states that the arbitration agreement must be in writing.¹ The 'NY Convention' did however not envision the prospect of engaging in an online agreement at the time when it was ratified in 1958.² At the same time, SA also did not envisage this technical feat when it promulgated the 'Recognition and Enforcement of Foreign Arbitral Awards Act' in 1977.³

Conversely, the 'Model Law on ICA', article 7(2)–article 7(4) permits the arbitration agreement to be legitimate and binding if its subject-matter is registered in any form.⁴

The apparent contradiction can be viewed as either a negation between the two instruments, or as a clarification of the 'NY Convention'. UNCITRAL, recognised; "the widening use of e-commerce and enactments of national legislation as well as case law, which are more favourable than the NY Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings, and the enforcement of arbitral awards;"⁵ when it issued

¹ UNCITRAL 'NY Convention (1958)' *op cit* article II(1); Hurter 'An Analysis of a New State of the Art SA ODR System' *op cit* 783.

² Bonnet *et al.* OADR 27.

³ Hurter 'An Analysis of a New State of the Art SA ODR System' *op cit* 783.

⁴ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 7(2); article 7(3); article 7(4).

⁵ UNCITRAL 'Recommendation regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the NY Convention (2006)' at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html, accessed 26 November 2013.

its 'Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1 of the NY Convention' in 2006,⁶ which proposed that signatory states must interpret the meaning of the arbitration agreement as contained in the 'NY Convention' as implying a wider meaning; thus acknowledging the legitimacy of online arbitration agreements. This 'Recommendation on Interpretation'⁷ is however not binding, but with it UNCITRAL advises or recommends that all the signatory states implement the requirements pertaining to arbitration agreements in a similar manner and as such it serves as a legal source of reference.⁸

The general consensus pertaining to the writing requirement therefore favours a broad interpretation that includes means of online communication.⁹ To this effect, the 'SA ECTA', article 12 states that the requirement for a document to be in writing is met whenever the document is in the form of a data message, and when, according to article 13, this data message is accessible for subsequent reference.¹⁰ These two articles correspond directly with the requirements set by the 'UNCITRAL Model Law on E-Commerce of 1996', article 6.¹¹

The national legislation of many states, from the Chinese Digital Signature Law 18 of 2004¹² to the Ghanaian Electronic Transactions Act 772 of 2008,¹³ fully acknowledge the legitimacy of online agreements and agreements concluded by means of electronic signatures, but national legislation on these aspects is not a widespread and many countries still need to adapt their legislation to acknowledge the legitimacy of online agreements.¹⁴

Although online agreements and contracting is binding and legitimate, the urgent amendment of the 'NY Convention' is still required in this respect, so as to avoid any further uncertainty on this matter.

The 'SA Arbitration Act', article 1 sets the following requirements for a valid arbitration agreement: (a) an agreement; (b) in writing; (c) to refer to arbitration any existing dispute or future dispute; (d) relating to any matter specified in the agreement.¹⁵

⁶ UNCITRAL 'Recommendation regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the NY Convention (2006)' *op cit s.p.*

⁷ *Ibid.*

⁸ Berger *Law of International Business and Dispute Settlement in the 21st Century* 355-369.

⁹ Hurter 'An Analysis of a New State of the Art SA ODR System' *op cit* 783.

¹⁰ 'SA ECTA 25 of 2002', article 12, article 13; Hurter 'An Analysis of a New State of the Art SA ODR System' *op cit* 783.

¹¹ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 6.

¹² 'People's Republic of China Digital Signature Law 18 of 2004'.

¹³ 'Ghanaian Electronic Transactions Act of 772 of 2008'.

¹⁴ Kaufmann-Kohler 'Arbitration Agreements in Online Business Transactions' *op cit* 355-369; Swales *op cit* 257-258.

¹⁵ 'SA Arbitration Act 42 of 1965', article 1(a)-(d); Ramsden *op cit* 25; Butler, Finsen *op cit* 37-41.

The 'Southern African Development Community (SADC) Model Law on Electronic Transactions and E-Commerce of 2012', article 6(1) states that whenever a law requires information to be in writing, that requirement is met by an online communication if the information contained therein is accessible and available for subsequent reference.¹⁶

The 'Model Law on ICA', article 7 provides two options for the definition of an arbitration agreement.¹⁷ The definition of an arbitration agreement in Option 1 is similar to the requirements in the 'SA Arbitration Act', article 1, with additional guidance provided on what the term in writing may include.¹⁸ Option 1, article 7(1) reads that an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.¹⁹ An arbitration agreement may be contained in a provision in a main transaction agreement or in a separate agreement.²⁰ (2) It shall be in writing.²¹ (3) It is in writing if its content is recorded in any form.²² (4) As long as it is accessible for future reference, 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.²³ (5) It is also in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.²⁴ (6) The reference in an agreement to any document containing an arbitration provision constitutes an arbitration agreement in writing, provided that the reference is such as to make that provision part of the agreement.²⁵ The 'Model Law on ICA' in other words provides that an agreement is in writing as long as its content is recorded, even if the agreement was concluded orally.²⁶ The 'in writing' requirement is met by online communication, or by the signature

¹⁶ SADC 'Model Law on Electronic Transactions and E-Commerce (2012)', article 6(1) s.v. 'Writing' at <https://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_e-transactions.pdf>, accessed 12 February 2014.

¹⁷ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* Option 1, article 7.

¹⁸ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* Option 1, article 7(1)-(3); 'SA Arbitration Act 42 of 1965', article 1.

¹⁹ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* Option 1, article 7(1).

²⁰ *Ibid.*

²¹ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* Option 1, article 7(2).

²² UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* Option 1, article 7(3).

²³ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* Option 1, article 7(4).

²⁴ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* Option 1, article 7(5).

²⁵ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* Option 1, article 7(6).

²⁶ Ramsden *op cit* 36-37; Butler, Finsen *op cit* 38-40.

of one party if not denied by the other party, or by reference to a written arbitration agreement.²⁷

A legislated provision that an agreement should be in writing implies that both parties should have signed it, but a document can constitute an agreement in writing even if it is only signed by one party or by neither party.²⁸ According to the Witwatersrand Division of the SA High Court in *Mervis Brothers v Interior Acoustics and Another*, the test is whether the parties deliberately intended to record their agreement in writing and according to Rosenblatt J of the NY Court of Appeals in *God's Battalion of Prayer Pentecostal Church Inc v Miele Associates LLP*, whether it can be shown that the document constitutes the agreement between them.²⁹ According to MacArthur J of the Witwatersrand Division of the SA High Court in *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd*, it would be sufficient proof that an agreement exists when the parties have adopted and acted on their agreement.³⁰

Similarly, the Witwatersrand Division of the SA High Court in *Wayland v Everite Group Ltd*, found that no arbitration agreement exists in writing where the person who signed the agreement on behalf of one of the parties did not have the necessary authority to do so.³¹ This holds that where the one of the signatories of the main agreement, that contains the arbitration provision, were not authorised to reach the agreement, the whole agreement will be invalid and unenforceable as a result thereof.³²

According to Cooper PJ of the California Appellate District in *Magness Petroleum Co v Warren Resources of California Inc*, an oral modification of a written agreement to arbitrate is not specifically enforceable.³³

What follows is a more detailed explanation of elements that the arbitration agreement should contain.

1.2. Description of the Dispute to be Resolved

The online arbitration agreement must specify which dispute(s) should be resolved.

²⁷ Ramsden *op cit* 37; Butler, Finsen *op cit* 38-40.

²⁸ *Ibid.*

²⁹ *Mervis Brothers v Interior Acoustics and Another* 1999(3) SA 607(W); *God's Battalion of Prayer Pentecostal Church Inc v Miele Associates LLP* US NY Court of Appeals 03/23/06 39; Ramsden *op cit* 37; Butler, Finsen *op cit* 38-40.

³⁰ *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd* 1992 (3) SA 825(W); Ramsden *op cit* 37; Butler, Finsen *op cit* 38-40.

³¹ *Wayland v Everite Group Ltd* 1993 (3) SA 946 (W); Ramsden *op cit* 38; Butler, Finsen *op cit* 38-40.

³² Ramsden *op cit* 38; Butler, Finsen *op cit* 38-40.

³³ *Magness Petroleum Co v Warren Resources of California Inc* US California Appellate Districts 11/18/02 B156183; Ramsden *op cit* 38; Butler, Finsen *op cit* 38 – 39.

1.3. (S)election of Online Arbitrators

The online arbitration agreement must lay down the method for the selection or election of the online arbitrators and the characteristics with which they will have to comply.³⁴

Online arbitrators must be chosen either by the parties themselves or by the service provider.³⁵ In each instance, parties should identify beforehand the characteristics, expertise and field of knowledge required from the online arbitrator(s) according to the nature of the online dispute.³⁶

The (s)election of the online arbitrator should at all times guarantee the independence and neutrality of the online arbitration panel or tribunal so as to help the proceeding to be fair.³⁷

The 'SA Arbitration Act', articles 9 and 10 make provision for the appointment of the arbitrator or arbitrators by agreement of the parties.³⁸ Article 9 states that unless the number of arbitrators is explicitly stated in the arbitration agreement the parties shall appoint one arbitrator.³⁹ Article 10(1) states that where an arbitrator leaves office, the party that appointed him/her may appoint another arbitrator.⁴⁰ Article 10(2) states that where a party fails to appoint an arbitrator in the agreed time and still fails to appoint an arbitrator after having been given seven days notice by the other party, the arbitrator(s) appointed by the other party shall be the sole arbitrators.⁴¹

The 'Model Law on ICA', articles 10 and 11 also makes provision for the appointment of arbitrators by agreement of the parties.⁴² Article 10 states that where the parties have not agreed on the number of arbitrators that there shall be three.⁴³ Article 11(3)(a) states that whenever there exists no agreement to the contrary, each party shall appoint one and that those two should then appoint another.⁴⁴ This article goes on by saying that where one party does not appoint her/his arbitrator within thirty days, the court should make that appointment.⁴⁵ Article 11(3)(b) concludes by saying that if the parties cannot agree on the

³⁴ Butler, Finsen *op cit* 79, 82-83.

³⁵ Bonnet *et al. op cit* 14; Butler, Finsen *op cit* 79-86.

³⁶ Butler, Finsen *op cit* 73-78.

³⁷ Bonnet *et al. op cit* 59.

³⁸ 'SA Arbitration Act 42 of 1965', article 9, article 10; Ramsden *op cit* 67-71; Butler, Finsen *op cit* 79-80.

³⁹ 'SA Arbitration Act 42 of 1965', article 9; Ramsden *op cit* 67; Butler, Finsen *op cit* 79-80.

⁴⁰ 'SA Arbitration Act 42 of 1965', article 10(1); Ramsden *op cit* 67; Butler, Finsen *op cit* 79-80.

⁴¹ 'SA Arbitration Act 42 of 1965', article 10(2); Ramsden *op cit* 67; Butler, Finsen *op cit* 79-80.

⁴² UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 10; article 11; Ramsden *op cit* 67-68; Butler, Finsen *op cit* 79-80.

⁴³ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 10; Ramsden *op cit* 68; Butler, Finsen *op cit* 79-80.

⁴⁴ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 11(3)(a); Ramsden *op cit* 68; Butler, Finsen *op cit* 79-80.

⁴⁵ *Ibid.*

appointment of a single arbitrator then the appointment shall be made by the court.⁴⁶

The 'Technical Notes', Section X' regulates how a neutral third party is selected.⁴⁷ Article 46 advises that the service provider should appoint a neutral third party only when s/he is required in accordance with any applicable OADR rules.⁴⁸

Article 47 advises that it is desirable that neutral third parties have the relevant professional experience as well as dispute resolution skills to enable them to deal with a dispute.⁴⁹ Neutral third parties do not necessarily need be qualified lawyers.⁵⁰

Article 48 advises with regard to the appointment and functions of neutral third parties, that it is desirable that: (a) the neutral third party has the necessary time, and; (b) is required to declare his/her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to it; (c) the OADR system allows parties to object to the appointment of a neutral third party; (d) in the event of an objection to an appointment of a neutral third party, the service provider is required to make a determination as to whether the neutral third party shall be replaced; (e) there is only one neutral third party per dispute appointed at any time; (f) a party is entitled to object to the neutral third party receiving information generated during the Negotiation Phase; and (g) if the neutral third party resigns or has to be replaced, the service provider is required to appoint a replacement.⁵¹

1.4. The Online Communication Devices (OCD's) to be Used during Online Arbitration Proceeding

The basic steps of online communication are the forming of online communicative intent, online message composition, online message encoding, online transmission of signal, online reception of signal, online message decoding and finally interpretation of the message by the online recipient.⁵²

All of this is enabled by an online communication device (OCD), which is a hardware device capable of transmitting an analog or digital signal over a telephone cable, online communication wire, or wirelessly.⁵³

⁴⁶ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 11(3)(b); Ramsden *op cit* 68; Butler, Finsen *op cit* 79-80.

⁴⁷ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section X.

⁴⁸ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section X, article 46.

⁴⁹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section X, article 47.

⁵⁰ *Ibid.*

⁵¹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section X, article 48(a)-(g).

⁵² *Ibid.*

⁵³ Computer Hope 'What is a Communication Device?' at

<<http://www.computerhope.com/jargon/c/communication-devices.htm>>, accessed 3 October 2015.

Probably the best example of an OCD is a computer modem, which is capable of sending and receiving an electronic signal to allow computers to virtually 'talk' to other computers over the telephone.⁵⁴ Other examples of online communication devices include a network interface card (NIC), Wi-Fi (Wireless Local Area Networking) devices, and an access point.⁵⁵ Other types of Wi-Fi devices, such as Peripheral Component Interconnect (PCI) Express Desktop, Laptop, Personal Computer (PC) Card and (Universal Serial Bus) USB Wi-Fi are also examples of online communication devices.⁵⁶

Various mobile devices have also been designed for many different online communicative functions and applications and include mobile computers; mobile Internet devices with mobile web access, such as smartphones and tablet computers; also wearable computers, such as calculator watches, smartwatches and head-mounted displays; personal digital assistants or enterprise digital assistants which includes handheld consoles, portable media players and ultra-mobile PC's; Digital Still Cameras (DSC); Digital Video Cameras (DVC) or digital camcorders; mobile phones, such as smartphones or feature phones; pagers; Personal Navigation Devices (PND) and smart cards.⁵⁷

OCD's are also available in a variety of forms, including smartphones on the low end, handheld (Personal Digital Assistant)PDA's, Ultra-Mobile PC's and Tablet PC's (Palm Operating System (OS), Web OS) as well as fixed desktop computers.⁵⁸

Parties would have to agree beforehand on the terms how such means will be used.⁵⁹

1.5. The Place of the Online Arbitration Proceeding

The place of arbitration is the place where the online arbitration proceeding occurs or takes place.⁶⁰ The place of arbitration is important when the jurisdiction of a court that has been approached to recognise or set an online arbitration award aside has to be determined as well as when the procedural law that applies to the online arbitration proceeding has to be determined.⁶¹

The online arbitration agreement generally only indicates the place where the online arbitration proceeding has to occur and not the actual address as the

⁵⁴ Wikipedia 'Mobile Device' at <https://en.wikipedia.org/wiki/Mobile_device>, accessed 3 October 2015.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Computer Hope 'What is a Communication Device?' *op cit s.p.*

⁵⁸ *Ibid.*

⁵⁹ Bonnet *et al.* *op cit* 17.

⁶⁰ Ramsden *op cit* 126; Butler, Finsen *op cit* 306.

⁶¹ *Ibid.*

parties 'convene' at their own addresses or wherever they find themselves with online communication linking them virtually together.⁶²

In the event that a party attempts to avoid arbitration in a certain place by for example claiming that a city or place is a *forum non-conveniens* the court will, when it determines the proper place for arbitration, as Power J of the High Court of Hong Kong did in *Greenwood Ltd v Pearl River Container Transportation Ltd and Other*, consider where the subject-matter of the dispute was the most closely connected to.⁶³

The 'Model Law on ICA', article 20 allows the arbitrator to determine the place of arbitration when the parties have not agreed on this beforehand.⁶⁴

In the event that the online arbitration agreement does not determine the place where the arbitration is to be performed, it will not make the outcome invalid.⁶⁵ This requirement is not indispensable for the legal validity of a proceeding and a fictional place can also be named to comply with this provision.⁶⁶ This is because online arbitrators and parties will in any case find themselves in locations that are poles apart and they will in any case conduct all their communication online, which makes the designation of a physical location for the online arbitration to occur superfluous.⁶⁷

2. THE CHOICE OF LAW OF THE TRANSACTION AND CHOICE OF LAW FOR THE RESOLUTION OF THE DISPUTE

2.1. Legislation

The 'Model Law on ICA', article 28(1) provides that the law designated by the parties is the substantive law unless otherwise expressed.⁶⁸ According to article 28(2) in the event where the parties have not designated the applicable law, the arbitration tribunal shall apply the law it considers applicable.⁶⁹ Article 28(4) permits the arbitration tribunal to take trade usage into account.⁷⁰

⁶² Ramsden *op cit* 126; Butler, Finsen *op cit* 306.

⁶³ *Greenwood Ltd v Pearl River Container Transportation Ltd and Other* High Court of Hong Kong, Special Administrative Region, 28 January 1994, (1994) 1HKC 585, CLOUT case 689; Ramsden *op cit* 126; Butler, Finsen *op cit* 306.

⁶⁴ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 20.

⁶⁵ Ramsden *op cit* 126; Butler, Finsen *op cit* 306.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 28(1).

⁶⁹ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 28(2).

⁷⁰ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 28(4).

2.2. Procedural Law

The 'SA Arbitration Act' and SA Roman Dutch common law, as influenced by English common law, governs arbitration in SA.⁷¹

The parties to an international arbitration proceeding are in terms of SA law at liberty to agree on the law that will be applicable to their arbitration proceeding.⁷² In the event where the parties to an international agreement have not agreed beforehand on which law will be applicable, the general rule of SA private law is that a distinction should be made between the rules of procedural law, or curial law, and the rules of substantive law.⁷³ Booysen J of the Natal Provincial Division (Durban High Court) explained in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* that the rules of procedural law, or curial law, are generally governed by the *lex fori*, or the place of arbitration, and that the rules of substantive law are generally governed by the *lex causae*, or the proper law of the underlying agreement, such as the law of the place where the agreement was concluded or was to be carried out.⁷⁴

According to Browne-Wilkinson L of the House of Lords in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*, it is common in international agreements for the proper law of the underlying agreement, the *lex causae*, to be different from the *lex fori*, or the procedural or curial law, which is generally determined by the seat of the arbitration.⁷⁵

The reliance on foreign legal concepts and case law in the interpretation of domestic law is not only permissible but is also common practice in the international arbitration industry.⁷⁶ The violation of public policy can usually only happen when a legal norm from a foreign jurisdiction is applied and then conflicts with domestic principles of law and natural justice or on that specific principle.⁷⁷

However, Bower CJ of the US 7th Circuit Court of Appeals did set aside an arbitration award in *Edstrom Industries Inc v Companion Life Insurance Co*, where the arbitration agreement stated that the law of a particular jurisdiction should be strictly applied.⁷⁸

When parties conclude the main agreement, they should agree on the choice of law of both their transaction and their online arbitration agreement. Since e-

⁷¹ 'SA Arbitration Act 42 of 1965', Ramsden *op cit* 128; Butler, Finsen *op cit* 97-99.

⁷² Ramsden *op cit* 128; Butler, Finsen *op cit* 97-99.

⁷³ *Ibid.*

⁷⁴ *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (S) SA 509 (D); Ramsden *op cit* 128; Butler, Finsen *op cit* 97-99.

⁷⁵ *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* (1993) AC 334 (HL); Ramsden *op cit* 128; Butler, Finsen *op cit* 97-99.

⁷⁶ Ramsden *op cit* 129; Butler, Finsen *op cit* 4-6.

⁷⁷ *Ibid.*

⁷⁸ *Edstrom Industries Inc v Companion Life Insurance Co* US 7th Circuit Court of Appeals 02/11/08 07-2165; Ramsden *op cit* 129; Butler, Finsen *op cit* 291-295.

commerce's nature is international, the choice of applicable law may be intricate as the application of different laws will lead to different results.⁷⁹ This point will lead to disagreement if different legal systems yield different results which favour the parties in different ways.⁸⁰

3. THE PROCEDURAL RULES PERTAINING TO THE ONLINE ARBITRATION PROCEEDING

With regards to legislation, the 'Model Law on ICA', article 19 makes provision for instances where the parties have not reached an agreement on the arbitration procedure to be followed, by saying that the arbitration tribunal may conduct the arbitration in a manner that it deems to be appropriate in the circumstances.⁸¹

Where the parties to an online arbitration proceeding have specifically agreed in their online arbitration agreement that the proceeding is to be regulated by the procedural rules of a specific service provider or institution, then both that stipulation and regulatory procedural rules cannot be unilaterally ignored by one of the parties or by the online arbitrator.⁸² In the event that a departure from these procedural rules occurs, such a departure should be of a consensual nature in order to be deemed legally valid.⁸³ The departure from the procedural rules must not be unreasonable in nature.⁸⁴ Unreasonableness in the departure from procedural rules has to be determined in the context of the High Court Rules.⁸⁵ In *Yunnan Engineering CC and Another v Chater and Others* Mavundla J of the SA High Court (Transvaal Provincial Division) listed the factors that the court will generally consider in this regard, namely (a) the extent of non-compliance; (b) the prejudice that is likely to be suffered by the complaining party; (c) the cause of such non-compliance; (d) the aspect of fairness and equity to all the parties; (e) the prospects of success of the complaining party in its defence or its claim; and (f) in the light of the above, whether such departure from the rules is reasonable.⁸⁶

⁷⁹ Ramsden *op cit* 45.

⁸⁰ Goldsmith *et al.* 'Grounding the Virtual Magistrate' NCAIR Dispute Resolution Conference Washington, DC (1996) p.3, available on <<http://www.umass.edu/dispute/ncair/groundvm.htm>>, accessed 24 February 2013.

⁸¹ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 19; Ramsden *op cit* 130; Butler, Finsen *op cit* 133-135.

⁸² Ramsden *op cit* 130; Butler, Finsen *op cit* 84.

⁸³ Ramsden *op cit* 130; Butler, Finsen *op cit* 265.

⁸⁴ Ramsden *op cit* 130; Butler, Finsen *op cit* 243-245.

⁸⁵ Ramsden *op cit* 130; Butler, Finsen *op cit* 135.

⁸⁶ *Yunnan Engineering CC and Another v Chater and Others* 2006 (5) SA 571 (T); Ramsden *op cit* 130; Butler, Finsen *op cit* 84, 265.

Not only the online arbitrator and the parties, but also the service provider is bound by its own procedural rules when it conducts itself in such a manner or creates the impression as to lead an arbitrating party to believe, on reasonable grounds, that an offer to be bound by its own procedural rules was made and the parties accepted this offer.⁸⁷ The Natal Provincial Division (Durban High Court) determined in *Chen v Association of Arbitrators of SA and Others* that an arbitration service provider was also bound by its own procedural rules when it made its procedural rules generally available for use by the parties.⁸⁸

An online arbitrator should at ensure that the minimum rights set out in the 'Model Law on ICA', such as article 19's requirement of a fair hearing,⁸⁹ article 29's requirement of an impartial adjudicator,⁹⁰ article 27's requirement of the right to present evidence,⁹¹ article 28's requirement of neutrality,⁹² and article 32's right to a resolution that is delivered in a time that is reasonable,⁹³ are followed because the award could otherwise be declared invalid.⁹⁴

3.1. Requirements pertaining to the Serving of a Notice of Process and Commencement of Proceedings

The 'NY Convention', article V(1)(b) asserts that an arbitration award may not be imposed by a judge of a national court of a signatory state when the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his/her case.⁹⁵

Along a similar tune, the 'Model Law on ICA', article 34(2) also states that the legitimacy and validity of the arbitration award is determined by whether the arbitrator had given proper notice of the proceeding to the parties.⁹⁶

According to the 'Technical Notes', Section V, article 29 the communications that may take place during the course of proceedings have been defined as any communication (including a, declaration, demand, notice, notification, request, response, statement or submission) made by means of

⁸⁷ Ramsden *op cit* 131; Butler, Finsen *op cit* 135.

⁸⁸ *Chen v Association of Arbitrators of SA and Others* 2003 (4) SA 96 (D); Ramsden *op cit* 131; Butler, Finsen *op cit* 97-99, 173-174.

⁸⁹ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 19.

⁹⁰ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 29.

⁹¹ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 27.

⁹² UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 28.

⁹³ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 32.

⁹⁴ Schiavetta 'The Relationship Between e-ADR and Article 6 of the European Convention of Human Rights' *JILT* (2004) 1 at <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_1/schiavetta/>, accessed 24 February 2013.

⁹⁵ UNCITRAL 'NY Convention (1958)' *op cit* article V1(b).

⁹⁶ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 34(2); Perritt 'The Internet is Changing the Public International Legal System' *Kentucky LJ* 88(4) (1999-2000) 886.

information generated, received, sent or stored by electronic, magnetic, optical or similar means.⁹⁷

Neither the 'NY Convention' nor the 'Model Law on ICA' defines exactly what constitutes 'proper notice,'⁹⁸ so it is up to the national civil procedural legislation of every signatory state of these instruments to determine and set out the regulations pertaining to the validity requirements when parties are validly notified of the institution of proceedings.⁹⁹

Until recently in SA, it was uncertain whether the notification of the installment of a proceeding had to be delivered in person, or whether online methods of serving process was also permitted. This was an important legal question for online arbitration because if a notification of the installment of a proceeding had to be delivered in person, then the online arbitration proceeding's costs and expenses would not be as cheap and time-sparingly as anticipated. If a notification for the installment of a proceeding had to be conducted through an offline system of physical delivery a significant portion of online arbitration would not be performed in cyberspace.¹⁰⁰ In 2012, Steyn J of the Kwazulu Natal High Court finally reached a decisive answer in this regard in *CMC Woodworking Machine (Pty) Ltd v Pieter Odendaal Kitchens* when he said that a service of summons can now also be served via Facebook and that this would constitute a functional equivalent to personal notification of the installment of a proceeding.¹⁰¹

According to the 'Model Law on ICA', article 34(2) a notification is considered to be delivered if it is received by the other party or if it is received at his/her place of business, habitual residence or mailing address.¹⁰²

From this it follows that the 'Model Law on ICA' is not specific over the exact circumstance in which a notification is received, and that a notification will also be legally deemed to have been received if it was sent via e-mail or through other online communication appliances.

The 'Technical Notes' does not define the term 'electronic address'.¹⁰³

The 'DPR', draft article 2(8) defined 'designated electronic address' as an information system, or portion thereof, designated by the parties to the ODR process to exchange communications related to that process.¹⁰⁴

⁹⁷ UNCITRAL 'Report of 49th Session (A/70/17)' op cit Annexure A, section V, article 29.

⁹⁸ UNCITRAL 'NY Convention (1958)' op cit article V(1)(b); UNCITRAL 'Model Law on ICA (1985/2006)' op cit article 34(2).

⁹⁹ Prendes *Online Arbitration* 17.

¹⁰⁰ *Ibid.*

¹⁰¹ *CMS Woodworking Machine (Pty) Ltd v Pieter Odendaal Kitchens* (6846/2006) [2012] ZAKZDHC 44; 2012 (5) SA 604 (KZD); Prendes op cit 17.

¹⁰² UNCITRAL 'Model Law on ICA (1985/2006)' op cit article 34(2).

¹⁰³ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section V, article 30.

¹⁰⁴ WG.III 'DPR (31st Session A/CN.9/WG.III/WP.133)' op cit section C, draft article 2(8), s.v. '(Designated) Electronic Address'.

Neither the 'NY Convention' nor the 'Model Law on ICA' clarifies whether notifications delivered and received via e-mail are valid.¹⁰⁵ The current legal arbitration framework needs to be updated in this respect to permit notifications to be legally deemed delivered and received by means of various online communications appliances.

The 'Technical Notes', Section VI regulates the commencement of proceedings and this is of important.¹⁰⁶ Article 33 states that in order for an OADR proceeding to begin, it is desirable that the claimant provide the OADR service provider with a notice that contains the following information: (a) the name and online address of the claimant and representative; (b) the name and online address of the respondent and representative; (c) the grounds of the claim; (d) any proposed solutions; (e) the language of choice; and (f) the signature or way in which the claimant/representative may be identified and authenticated.¹⁰⁷

Article 34 determines that an OADR proceeding may be seen to begin when the service provider notifies the respondent that the notice of the claimant is available at the ODR Platform.¹⁰⁸

Article 36 advises that both the notice and response should be accompanied by all documents and other evidence.¹⁰⁹ In addition, it also advises that in the event that a claimant is pursuing any other legal remedies, it should be divulged in the notice.¹¹⁰

3.2. The Burden of Proof

The 'Technical Notes' sets no requirements on the burden of proof.

According to the 'DPR', draft article 7, each party would have borne the burden of proving the facts relied on to support his/her claim or defence.¹¹¹ The neutral third party would however have had the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so required.¹¹²

According to draft article 7(3) the neutral third party would then have evaluated the dispute based on the information submitted by the parties and have had regard to the terms of the agreement.¹¹³

Draft article 7(8) stipulated that in all cases, the neutral third party would have had to decide *ex aequo et bono*, in accordance with the terms of the

¹⁰⁵ WG.III 'DPR (31st Session A/CN.9/WG.III/WP.133)' *op cit* section C, draft article 2(8), s.v. '(Designated) Electronic Address'.

¹⁰⁶ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VI.

¹⁰⁷ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VI, article 33(a) – (f).

¹⁰⁸ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VI, article 34.

¹⁰⁹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VI, article 36.

¹¹⁰ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VI, article 36.

¹¹¹ WG.III 'DPR(A/CN.9/WG.III/WP.133)' *op cit* section C, draft article 7(2).

¹¹² WG.III 'DPR(A/CN.9/WG.III/WP.133)' *op cit* section C, draft article 7(2).

¹¹³ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* section C, draft article 7(3).

agreement, taking into consideration any relevant facts and circumstances, and would have had to take any usage of trade applicable to the transaction into account.¹¹⁴

3.3. The Rules of Procedure pertaining to the Presentation of Evidence

With regard to matters relating to electronic evidence, the rules that govern the admissibility of electronic evidence in the SA law of evidence centers around whether the evidence is of a documentary nature or real.¹¹⁵ Once this established a procedure which consists of two phases are applied, where firstly the admissibility of the e-evidence has to be determined, and as soon as it is determined as being admissible, its evidential weight will have to be established.¹¹⁶ The 'SA ECTA', article 15 makes provision for both the admissibility and evidential weight of a data message as e-evidence.¹¹⁷ From article 1, which defines a data message as data generated, sent, received or stored by electronic means, one can see that this 'Act' has the aim of facilitating instead of inhibiting the admissibility of data messages as e-evidence.¹¹⁸

The first phase which requires the admissibility of a data message as e-evidence will have to take the form of a 'trial within a trial'.¹¹⁹ This procedure allows questions that relates to the admissibility of the e-evidence.¹²⁰

With regards to documentary evidence, the 'SA Civil Proceedings Evidence Act 25 of 1965', article 33 defines a document as any book, map, plan, drawing or photograph.¹²¹ At the same time, the 'SA Criminal Procedure Act 51 of 1977', article 221(5) states that a document includes any device which records or stores information.¹²² To this effect, on the question of what constitutes a document, the Transvaal Provincial Division held in *Seccombe v Attorney General* that a 'document' should be interpreted widely so as to include everything that evidences written or pictorial proof of something, irrespective of what material it consists.¹²³

The 'SA ECTA', article 17(1) sets the following requirements for producing or displaying documents; (a) the method of generating the online form must be reliable and must be able to maintain the integrity of its contents, and

¹¹⁴ WG.III 'DPR(A/CN.9/WG.III/WP.133)' *op cit* section C, draft article 7(8).

¹¹⁵ Watney M 'Admissibility of Electronic Evidence in Criminal Proceeding' *Journal of Information Law and Technology* (2009) 1.

¹¹⁶ *Ibid.*

¹¹⁷ 'SA ECTA 25 of 2002', article 15; Watney *op cit* 3.

¹¹⁸ 'SA ECTA 25 of 2002', article 1; Watney *op cit* 3.

¹¹⁹ Watney *op cit* 4.

¹²⁰ *Ibid.*

¹²¹ 'SA Civil Proceedings Evidence Act 25 of 1965', article 33; Watney *op cit* 5.

¹²² 'SA Criminal Procedure Act 51 of 1977', article 221(5); Watney *op cit* 5.

¹²³ *Seccombe v Attorney General* (2002) (2) All SA 185 (Ck); Watney *op cit* 5.

(b) at the moment when the data message was transmitted it must have been readily accessible so that it could be retained for reference in the future.¹²⁴

With regards to the production of the original, article 14 lays down the requirements for preserving the integrity of a data communication, by providing in article 14(1)(b) that the final production or display of the data message must be capable of being produced to the person to whom it is to be presented or displayed.¹²⁵ Article 14(2)(a) states that to determine the data message's integrity, it must be evaluated to determine whether it has remain whole and unedited, (b) whether the production or display corresponds with the purpose for which the message was initially sent, and (c) any other relevant circumstances may be taken into account.¹²⁶

With regards to authenticity, article 15(1) makes provision for the general admissibility of data messages.¹²⁷ This article has the proviso that a data message may not be admissible if other pieces of legislation bar it from being used.¹²⁸

Conventionally the law deems evidence such as audio, graphics and video as real evidence.¹²⁹ Real evidence differs from documentary evidence in the sense that the former is never excluded as long as it is relevant to the case in point.¹³⁰ This does however not prevent its accuracy, authenticity and interpretation to be questioned and disputed.¹³¹

With regards to the admissibility of evidence, an online arbitrator and the parties are however not bound by the rules of evidence applicable in court proceedings and evidence which is inadmissible in a court of law cannot on that basis alone be rejected in an online arbitration proceeding.¹³²

According to the Cape Provincial Division in *Benjamin v SOBAC (Pty) Ltd*, an arbitrator is entitled to act on any material which is logically probative and even hearsay evidence can be admitted when it can fairly be regarded as reliable in the circumstances.¹³³

After the first phase that requires the admissibility of a data message as e-evidence has concluded and the e-evidence was admitted, the second phase requires the online arbitrator to attach evidentiary weight to the e-evidence.¹³⁴ In

¹²⁴ 'SA ECTA 25 of 2002', article 17(1)(a)-(b); Watney *op cit* 6.

¹²⁵ 'SA ECTA 25 of 2002', article 14(1)(b); Watney *op cit* 7.

¹²⁶ 'SA ECTA 25 of 2002', article 14(2)(a)-(c); Watney *op cit* 7.

¹²⁷ 'SA ECTA 25 of 2002', article 15(1); Watney *op cit* 7.

¹²⁸ *Ibid.*

¹²⁹ Watney *op cit* 9.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Benjamin v SOBAC (Pty) Ltd* 1989 (4) SA 940 (C); Ramsden *op cit* 146; Butler, Finsen *op cit* 226.

¹³⁴ Watney *op cit* 10.

his/her decision, the online arbitrator has to determine the weight that s/he will attach to the e-evidence after s/he has evaluated it in its totality.¹³⁵

The 'SA ECTA', article 15(3) states that when evidentiary weight is coupled to the e-evidence, the following factors must be assessed; (a) whether the data message was generated, stored or communicated in a manner that is reliable, (b) whether the integrity of the data message has been retained in a reliable manner, and (c) whether the creator of the data message has been identified in a reliable manner, as well as (d) any other factor that is relevant.¹³⁶

The rules of the online arbitration proceeding should allow parties to present any kind of evidence that they regard convenient, such as documents, witnesses, experts' opinions or any other kind of evidence, to support their arguments through the proper mechanisms.¹³⁷ An inspection *in loco* would however still require the parties to physically inspect a terrain, or it could be that they send an official of the service provider to a specific site to make a live video or take measurements, which is then streamed live during the online arbitration proceeding for all to see firsthand in real time.¹³⁸

3.3.1. The Rules of Procedure pertaining to Documentary Evidence

According to the Southern Rhodesian High Court in *Salisbury Portland Cement Co Ltd and Another v Edwards Timber and Lime Industries (Pvt) Ltd and Another*, when documents contain facts that are properly related to a matter in issue in an arbitration proceeding and such documents are *prima facie* in the possession of one of the parties, the arbitrator possesses the authority to order that party to produce those documents before him/her.¹³⁹ The prerequisite for a *subpoena duces tecum* is that those documents must be relevant to a key issue of the arbitration.¹⁴⁰

When there are allegations of damage, the party who had suffered the damage will have to take the lead in presenting the primary evidence.¹⁴¹ In *Consolidated Projects Ltd v The Owners of the Tug 'De Ping'* one of the parties made an application for the inspection of the damage to a ship and in this instance Waung J of the High Court of Kong Special Administrative Region held that it was not the function of the court to achieve equality of position for the parties by granting the rights of inspection where there is a binding arbitration

¹³⁵ Watney *op cit* 10.

¹³⁶ 'SA ECTA 25 of 2002', article 15(3)(a)-(d); Watney *op cit* 10.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Salisbury Portland Cement Co Ltd and Another v Edwards Timber and Lime Industries (Pvt) Ltd and Another* 1962 (2) SA 167 (SR); Ramsden *op cit* 146-147; Butler, Finsen *op cit* 239-240.

¹⁴⁰ Ramsden *op cit* 147; Butler, Finsen *op cit* 239-240.

¹⁴¹ *Ibid.*

agreement.¹⁴² The Court went on saying that unless there was a possibility that the one party will be suffering serious and irreparable damage such an order was not to be granted.¹⁴³

Also of significance in this regard is the decision of Wesley CJ of the US 2nd Circuit Court of Appeals in *Life Receivables Trust v Syndicate 102*, where he held that the US Federal Arbitration Act (FAA) of 1925, article 7 does not enable arbitrators to issue pre-hearing document *subpoenae* to persons who are not parties to the arbitration proceedings.¹⁴⁴

However, according to Baxter J of the California Appellate Districts in *Berglund v Arthroscopic & Laser Surgery*, persons who are not party to the arbitration proceedings may also seek judicial review of discovery orders addressed to them without the limitations of review of discovery orders applicable to parties.¹⁴⁵

The parties are at liberty to present documents, as well as other written evidence such as charts, graphs or photos via e-mail attachments or postings in a chatroom coupled to, or distribute them, on the online arbitration platform.¹⁴⁶ When the parties present their documentation online to serve as evidence - encryption should be used to ensure its authenticity and to avoid alterations or modifications.¹⁴⁷

3.3.2. The Rules of Procedure pertaining to the Testimony of Witnesses

According to the 'SA Arbitration Act', article 17, the oral evidence of witnesses shall be recorded in such a manner and to such extent as the parties may agree.¹⁴⁸

The arbitrator has no power in terms of the 'Model Law on ICA', article 27 to coerce witnesses to testify.¹⁴⁹

Along the same line, the failure of a party to seek judicial assistance to compel a party or a witness to testify cannot according to Catzmann J of the Canadian Superior Court of Justice in *Re Corporacion Transnacional de*

¹⁴² Ramsden *op cit* 147; Butler, Finsen *op cit* 239-240.

¹⁴³ *Consolidated Projects Ltd v The Owners of the Tug 'De Ping'* High Court of Kong Special Administrative Region, 10 January 2000, CLOUT case 458; Ramsden *op cit* 147.

¹⁴⁴ *Life Receivables Trust v Syndicate 102 at Lloyd's of London* US 2nd Circuit Court of Appeals 11/25/08 071197; Ramsden *op cit* 147; Butler, Finsen *op cit* 145-146.

¹⁴⁵ *Berglund v Arthroscopic & Laser Surgery* US California Appellate Districts 05/22/06 D045218A; Ramsden *op cit* 147; Butler, Finsen *op cit* 143-144.

¹⁴⁶ Cavenagh *et al. Cyberjustice* 87.

¹⁴⁷ Kauffmann-Kohler, Schultz *op cit* 192.

¹⁴⁸ 'SA Arbitration Act 42 of 1965', article 17; Ramsden *op cit* 146; Butler, Finsen *op cit* 187-188.

¹⁴⁹ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 27; Ramsden *op cit* 146; Butler, Finsen *op cit* 181.

Inversiones, S.A. de C.V. et al and STET International S.p.A et al. be assigned to the arbitrator.¹⁵⁰

The parties are at liberty and have a right to present an expert witness on any matter during the proceeding.¹⁵¹

According to Pillay J of the SA Labour Court in *Standard Bank of SA Ltd v Fobb and Others*,¹⁵² where evidence on a new matter is presented during the re-examination of a witness, the arbitrator must afford the opposing party an opportunity to deal with the new evidence presented.¹⁵³

As previously mentioned, the testimony of witnesses and the opinions of experts may be rendered through various means of online communication; parties can choose to offer this evidence through videoconference, by using Voice over Internet Protocol (VoIP) or via chatrooms, etc. If parties wish to have exact written evidence of the witness' testimony this will not detract the proceeding from being online arbitration.

Another important point is the credibility of evidence. When witnesses give written testimony, it avoids pressure that is put on them, and it also allows them to better formulate the answers to questions; this then means that the witnesses are less influenced during the cross-examination. The testing of a witness is traditionally done through robust cross-examination to test consistency, credibility, demeanour, etc. If a witness is given time and advice how to answer, this will contradict the normal way of giving evidence. When witnesses render their testimony online, the arbitrator and all the parties should be sure that the actual witness is giving evidence and that s/he is not being coached and this can be done by a split screen television where one camera is focused on the witness and the other camera on the back of the room where the witness is sitting (in effect showing just an empty room), so as to indicate that there are no lawyer or party present in the room with the witness to suggest answers to questions.

3.3.3. The Rules of Procedure pertaining to Other Evidence

The parties should be allowed to present all types of evidence by means of online communication. It may be presented to the arbitrators in any way, ranging from photographs, films, live streaming to everyone for examination.¹⁵⁴

¹⁵⁰ *Re Corporacion Transnacional de Inversiones, S.A. de C.V. et al and STET International S.p.A et al* Canada: Superior Court of Justice, 22 September 1999, 45 OR (3d) 183; affirmed (2000) 49 OR (3d) 414, Clout case 391; Ramsden *op cit* 146; Butler, Finsen *op cit* 181.

¹⁵¹ Ramsden *op cit* 146; Butler, Finsen *op cit* 181.

¹⁵² *Standard Bank of SA Ltd v Fobb and Others* 2003 (2) SA 692 (LC).

¹⁵³ Ramsden *op cit* 146; Butler, Finsen *op cit* 193-194.

¹⁵⁴ Hörnle 'Disputes Solved in Cyberspace' *JILT* (2001) s.p.at <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_2/hornle/>, accessed 24 February 2013; Prendes *op cit* 38.

The 'Model Law on ICA', article 27 determines the procedure pertaining to court assistance in taking evidence, by stating that the arbitration service provider may request assistance in taking evidence from a court that is vested with the jurisdiction of the state which law governs the proceeding.¹⁵⁵ The court may then execute the request within its competence and according to its rules on taking evidence.¹⁵⁶

4. CONCLUSION

Due to its special characteristics, online arbitration requires a special set of provisions that regulate the entering into the online arbitration agreement, the use of online communications in the proceeding, and the rendering and enforcing of the award.

Such regulations should be made to ensure the fairness, equality and simplicity of the proceeding, and facilitate the easy enforcement of the award.

¹⁵⁵ UNCITRAL '*Model Law on ICA (1985/2006)*' *op cit* article 27.

¹⁵⁶ *Ibid.*

CHAPTER 4:

THE LEGAL REQUIREMENTS OF ONLINE ARBITRATION

1. INTRODUCTION

An online arbitration proceeding's legal validity is not found exclusively on the affirmation of proper jurisdiction. Its legal validity is also constituted of other natural justice components such as the fairness of the proceeding.¹

Authenticated and unequivocal assent is a representation of the affirmation of proper jurisdiction, whereas the ability to obtain such assent during the proceeding can be deemed as an element of fair process.²

This chapter will focus on the legal characteristics of the Internet and online arbitration, on the legal requirements for fair and efficient online arbitration, and on the recognition and enforcement of the outcome of a proceeding.

2. THE LEGAL CHARACTERISTICS OF THE INTERNET AND ONLINE ARBITRATION

This section will consider jurisdiction in cyberspace, the concerns of the seat of online arbitration in cyberspace, the legal status of floating arbitration, and the legal status of floating awards.

2.1. Determining Jurisdiction in an Online Arbitration Proceeding

The primary consideration for any forum to resolve a dispute, is that it must have jurisdiction over the dispute.³ Jurisdiction is derived from the arbitration agreement. The online arbitrator must have been legally assigned the responsibility to adjudicate and give a binding decision on a dispute, and the resulting award must be able to be legally recognised and enforced.

National sovereignty of states dictates that their legislation has to be applied to all commerce occurring in their jurisdiction.⁴ Online arbitration has consequently since its beginning been confronted with the need to create legal certainty as to which law or legislation will govern a certain proceeding.⁵

¹ Forsyth *Administrative Law* 488.

² *Ibid.*

³ Perritt 'Electronic Dispute Resolution' at <<http://www.law.vill.edu/ncair/disres/PERRITT.HTM>>, accessed 10 May 2014.

⁴ Goldsmith *op cit* 1199.

⁵ *Ibid.*

It is challenging to apply national legislation, which is understood mainly in geographic terms, to a medium such as the Internet that resists any geographical disposition.⁶

The clashing concepts of cyberspace and jurisdiction lead to a dilemma, because sovereignty must be respected, but IT must also be accommodated.⁷ Cyberspace and IT erode the concept of national sovereignty because it diminishes the nexus between geographic location and national legislation.⁸

Private International Law has dealt with this challenge to jurisdiction by affording the parties to an international agreement the opportunity to agree in advance on the law that will govern their agreement. The parties are allowed to choose either the law where one of the parties resides, the law of the place where the agreement was signed or is to be performed, or some other random neutral jurisdiction that does not have a link to either of them. In maritime arbitration, the term 'Arbitration Hamburg' has long indicated this kind of choice.

In e-commerce there are at least two opposing schools of thought for the resolution of the jurisdictional dilemma:⁹ the first one contends that the online consumer should be protected by the laws applicable in his/her country of residence; the 'country of destination' approach.¹⁰ The other contends that the applicable law should be the law from the jurisdiction where the online merchant is based and conducts his/her business from; the 'country of origin' approach.¹¹

The first approach entails that online merchants should observe the legislation of the 190 sovereign legal jurisdictions of the world.¹² The second again prevents any state from giving a guarantee to its nationals that they will have adequate recourse and safeguards.¹³

2.2. The Seat of an Online Arbitration Proceeding in Cyberspace

A proceeding's seat is defined as the place specifically or implicitly agreed upon, whose law will preside over the procedure of such a proceeding.¹⁴ The place where the online arbitration hearing occurs will usually be the legal seat of the proceeding.¹⁵ Since it is the nexus to the law and legislation that will govern the proceeding, the determination of the place or seat of a proceeding is of great

⁶ Burk *op cit* 38.

⁷ Johnson *et al. op cit* 1372.

⁸ *Ibid.*

⁹ Tarruella 'Cross-Border Disputes on Online Consumer Agreements' *Journal of Network Industries* 2 (2001) 21.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Boyd *et al. Commercial Arbitration* 258.

¹⁵ Goode *Commercial Law* 1185.

significance.¹⁶ The place or seat of a proceeding also establishes which court will be vested with jurisdiction to assist during the proceeding or to set the award aside or to have it recognised and/or enforced.¹⁷

Usually, the choice of the seat in arbitration is influenced by its practicality for the parties as well as the arbitrators, where the material of the dispute is located, the distances to be travelled and the proximity of evidence.¹⁸

Since online arbitration occurs in cyberspace, a proceeding has no location or seat in the geographical sense of the word.¹⁹ The digitalisation of information, resulting in its dematerialisation, is just one example of how IT challenges the determination of the seat in a proceeding.²⁰ This because a geographical place is in essence digitalised and translocated to virtual reality.²¹

2.3. The Legal Position of Online Arbitration that Floats in Cyberspace

Floating or de-localised online arbitration is not based on any specific national law.²² It enables the parties' agreement to not be dependent on any specific legal system's substantive rules, or to the rules on the conflict of laws.²³

The UK's law traditionally failed to recognise arbitration that is not connected with a national law system and where the arbitrator is at liberty to control the proceeding as s/he sees fit.²⁴ To this effect, Kerr LJ of the English Court of Appeal stated in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.* that agreements are unable to exist in a legal void, and that such a legal void will reduce agreements to pages of paper that lack legal consequence, unless they incorporate some private law system.²⁵

The de-localisation theory was again rejected by Mustill LJ of the House of Lords in *Coppée Lavalin S.A./N.V. v Ken-Ren Chemicals and Fertilisers Ltd* when he refuted the de-localisation theory from taking hold in English law.²⁶

Mustill LJ explained the legal concept of transnationalism by saying that it is a hypothetical notion which posits that international arbitration is an autonomous

¹⁶ Domke *Domke on Commercial Arbitration* 575.

¹⁷ Gill *et al. Russell on Arbitration* 74.

¹⁸ *Ibid.*

¹⁹ Arsic 'International Commercial Arbitration on the Internet' *Journal of International Arbitration* 14(3) (1997) 209.

²⁰ *Ibid.*

²¹ Davis 'The First International Competition for OADR' *op cit* 424.

²² Collins *et al. op cit* 604.

²³ Kuner, Schneider 'Dispute Resolution in International E-Commerce' *Journal of International Arbitration* 14(3) (1997) 5.

²⁴ Goode *op cit* 1185.

²⁵ *Amin Rasheed Shipping Corporation v Kuwait Insurance Co.* (1983) 3 WLR 249; Goode *op cit* 1185.

²⁶ *Coppée Lavalin S.A./N.V. v Ken-Ren Chemicals and Fertilisers Ltd* (1994) 2 Lloyd's Rep 115; Goode *op cit* 1186; Haitham OADR as a Solution to Cross-Border Electronic E-Commerce Disputes 1084.

judicial proceeding, inherently detached from national systems of law, and in reality antithetical to any national system of law.²⁷ Should the ideal of transnationalism fully materialise, national courts will, according to him, no longer play any role in the law and practice of international arbitration at all and distinctions between different national laws will become extraneous.²⁸

According to one writer, Shackleton, de-localisation does not demand the elimination of all localisation, only for a decrease of its significance.²⁹

A writer such as Thieffry states that the 'Model Law on ICA' itself was a triumph for the theory of de-localisation as it enabled a breakdown of national particularism.³⁰

The attitude in the UK towards floating arbitration has changed since the introduction of the 'UK's Arbitration Act', as it is based on the 'Model Law on ICA'.³¹ The 'UK's Arbitration Act', article 3, established for the first time that the legal construct of the seat is not connected in a direct manner to the arbitration's forum and that the seat may be established by a variety of factors.³² Article 3 states that the seat of arbitration refers to the juridical seat of the proceeding as selected and duly assigned firstly, by the parties; or secondly, by the service provider; or thirdly, the arbitration forum. When parties make no such indication, the seat shall be determined by the arbitrator by interpreting the agreement to look for clues.³³

One writer, Nottage, contends that because the location of the proceeding is no longer of such great significance, and due to the fact that party autonomy was afforded greater significance in the 'UK's Arbitration Act', this augments the freedom of the parties to agree on the place of the proceeding.³⁴ This is levelheaded, since the notion that arbitration is supposed to have a nexus to the place where it is held, will always be challenged by the nature of the Internet.³⁵

In the meantime, the location of the online arbitration platform might become a concept of core legal significance in the future.³⁶ It is certainly not too far-fetched to perhaps determine the concept of jurisdiction by looking at the location of the platform and to construe this as the seat of the online arbitration.

²⁷ Goode *op cit* 1186.

²⁸ *Coppée Lavalin S.A./N.V. v Ken-Ren Chemicals and Fertilisers Ltd* (1994) 2 Lloyd's Rep 119; Goode *op cit* 1186; Haitham *op cit* 104.

²⁹ Shackleton 'Global Warming' *International Arbitration LR* 3(74) (2000) 59; Haitham *op cit* 105.

³⁰ Thieffry *et al.* 'Negotiating Settlement of Dispute Provisions' *Business Lawyer* 9 (1990) 45 577.

³¹ Boyd *et al.* *op cit* 305.

³² *Ibid.*

³³ 'UK Arbitration Act 23 of 1996', article 3(a)-(c).

³⁴ Nottage 'Transnational Commercial Arbitration and the *Lex Mercatoria*' *Arbitration International* 16(2000) 55.

³⁵ Nottage *op cit* 55; Arsic *op cit* 221.

³⁶ *Ibid.*

2.4. The Validity of Floating Online Arbitration Awards in Cyberspace

The place of arbitration used to be the decisive factor that conventionally determined whether an award was foreign or domestic.³⁷

The 'NY Convention', article 1(1) defines a foreign arbitration award as an award, other than a domestic award, which was made in different legal jurisdiction than where recognition and enforcement is sought and determines that the 'Convention' shall be applicable to such awards.³⁸

A foreign arbitration award is defined in the 'UK's Arbitration Act', article 100(1) as an award which was delivered according to the requirements set out in an agreement, within the legal jurisdiction of a state, besides the UK, which is a signatory of the 'NY Convention'.³⁹

The law that governs the proceeding could determine the nationality of an award.⁴⁰ An online arbitrator should consequently not rely on a geographical decisive factor to establish if an online arbitration award's status is foreign or domestic.⁴¹ It is evident that awards that are deemed to be 'non-domestic' also comprise awards that were delivered in states that are signatories of the 'NY Convention', but where enforcement of the award is then sought in a state that is not a signatory, and where one of the parties are foreign.⁴²

A floating online arbitration award could be seen as a manner in which the reality of a virtual online arbitration awards can be accommodated.⁴³ A floating online arbitration award is constructed on the notion that allows parties to reach an agreement to disengage their award from the jurisdiction of whichever national law.⁴⁴ A basic feature of a de-localised or floating arbitration agreement and its resulting de-localised or floating arbitration award is that its existence, effectiveness or validity is not dependant on any specific national law.⁴⁵

3. THE LEGAL REQUIREMENTS FOR FAIR AND EFFICIENT ONLINE ARBITRATION

An important feature of a fair legal procedure is that decision-making bodies only has the authority to resolve disputes when they apply comparatively formal and adjudicatory procedures and rules of evidence in terms of legislation or

³⁷ Van Den Berg 'Non-Domestic Arbitral Awards under the NY Convention' *Arbitration International* 2 (1986) 191.

³⁸ Hunter *et al. op cit* 364.

³⁹ 'UK Arbitration Act 23 of 1996', article 100(1).

⁴⁰ Contini 'ICA' *American Journal of Comparative Law* 8 (1959) 292.

⁴¹ Bianchi *et al. op cit* 31.

⁴² *Ibid.*

⁴³ Van Den Berg *op cit* 29.

⁴⁴ *Ibid.*

⁴⁵ Collins *et al. op cit* 604.

regulations.⁴⁶ A need to translate the concept and consequences of fair process into the *lex electronica arbitralis* is needed, since private dispute resolution are still required to make use of public dispute resolution's legal framework to a large extent.⁴⁷ At the same time it is difficult to examine online arbitration with a public law concept of fairness, such as that found in administrative law.⁴⁸ Yet, some prerequisites of a legal proceeding are so essential that they cannot be waived as it would leave the proceeding without legal validity.⁴⁹

This section will firstly look at fair process and efficiency, and secondly at the requirements of a fair and efficient online arbitration proceeding.

Online arbitration can ensure greater access to justice and fairness than what the court-based legal system.⁵⁰ It has the ability to be constructed in such a manner that it can sidestep certain legal procedures that service providers might regard as too costly, or that will disadvantage a party.⁵¹ While trying to be as cost-effective and time-efficient as possible, online arbitrators must always guard against the exclusion of certain principles that have to be present in order to constitute a legally valid proceeding and outcome.⁵² High speed enables a faster outcome and less legal fees, but can easily also result in the following of simplified procedures which does not adhere to prescribed formality.⁵³

Depending on the features of a specific proceeding, the relevance as well as the weight of certain legal principles will differ.⁵⁴ To increase the efficiency of the proceeding, the parties are encouraged to agree beforehand in the online arbitration agreement whether discovery and fact-finding will be allowed, as well as the rules for presenting arguments and evidence.⁵⁵

The three requirements of a fair process are, in a specific order, its independence,⁵⁶ transparency and authenticity.⁵⁷

3.1. The Independence of the Online Arbitration Proceeding

An essential component of fair process in online arbitration is the arbitrator's evenhandedness and impartiality.⁵⁸ Impartiality requires that the online arbitrator must both be neutral, and be seen as being neutral.⁵⁹

⁴⁶ Palmer *et al. Dispute Process* 212.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Perritt 'Electronic Dispute Resolution' *op cit s.p.*

⁵⁰ Forsyth *et al. op cit* 665.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Forsyth *et al. op cit* 666.

⁵⁶ Hurter 'Dispute Resolution in Cyberspace' *op cit* 202.

⁵⁷ Bevan *ADR* 32.

⁵⁸ Forsyth *et al. op cit* 439.

The online arbitrator must exercise his/her discretion to construct the proceeding in compliance with the parties' arbitration agreement, the service providers' rules and regulations, the principles of natural justice as well as the law that is pertinent to online arbitration and the dispute.⁶⁰

ICANN's Uniform Dispute Resolution Policy (UDRP), article 7, states that an arbitrator must be neutral and independent and shall disclose any facts and situations that could possibly lead to reasonable doubt as to neutrality or independence.⁶¹

3.2. The Transparency of the Online Arbitration Proceeding

The parties to a dispute must be certain that they will be afforded sufficient opportunity to present their arguments and evidence and to partake and that they will both be subject to the same terms and conditions.⁶² The procedures that are followed during a proceeding must allow all the parties to present their arguments and evidence on the platform and afford equal opportunity to each to evaluate and cross-examine each other's arguments and evidence.⁶³ Unfortunately, the 'Technical Notes' sets no guidelines.

3.3. The Authenticity of an Online Arbitration Proceeding

Any means of authenticating information in a digitalised format, in an online environment, for instance, can be understood to comprise online authentication. An example of authentication is where a party wants to confirm the authenticity of an online document's contents, its author or sender.⁶⁴

IT presents the problem that the copying or replication of online documents is easier than to guarantee the authenticity of those online documents.⁶⁵ During the data transmission process over the Internet, various momentary replications are made along the way when the data is transmitted,⁶⁶ which could be intercepted or re-routed.⁶⁷

An online arbitrator should ensure the authenticity of the contents of online communications posted on the platform to firstly ensure its integrity; and

⁵⁹ Forsyth *et al.* *op cit* 439.

⁶⁰ *Ibid.*

⁶¹ ICANN 'UDRP(1999)', article 7 at <<http://www.icann.org/en/help/dndr/udrp>>, accessed 11 May 2014; Rule OADR for Businesses *op cit* 239.

⁶² Rule OADR for Businesses *op cit* 250.

⁶³ *Ibid.*

⁶⁴ Rule OADR for Businesses *op cit* 252.

⁶⁵ Chissick *et al.* *op cit* 321.

⁶⁶ Burk *op cit* 38.

⁶⁷ Davis 'The First International Competition for OADR' *op cit* 426.

secondly, that it was completely transmitted; and thirdly ascertain whether an online communication is what it says it is.⁶⁸

The service provider should also verify the identity of the author, and the sender and whether s/he was authorised to send an online communication.⁶⁹

The outcome and award have to be brought under the attention of the parties in such a manner that they will not be able to reject or renounce it.⁷⁰ Service providers will also have to transmit the award to the authority who will enforce it.⁷¹ The 'NY Convention' presents a challenge as an online arbitration award does not amount to an executorial writ.⁷² Article 4(1) states that for an arbitration decision to be recognised and enforced, the party requesting recognition and enforcement must first furnish the original award or a certified copy, and; secondly, the agreement or a certified copy.⁷³

3.3.1. The Legal Requirements for Valid Electronic Signatures during an Online Arbitration Proceeding

Electronic signatures have a significant role to play in e-commerce as they guarantee the recipient of an online communication that such communication was transmitted by an identified and specific party, and that no other party, other than the transmitter could have had the right to use the electronic signature without first having obtained its author's permission.⁷⁴ It guarantees that it was indeed the sender who transmitted the online communication, and that no editing occurred during transmission.⁷⁵

The paperless *lex electronica arbitralis* is still impeded by certain conventional rules and service provider terms and conditions that require physical paper documents that were authentically signed.⁷⁶

The 'Model Law on Electronic Signatures of 2001' is of particular relevance, as it facilitates the use of electronic signatures by setting out criteria in articles 6 and 7 pertaining to the requirements for signatures,⁷⁷ after having made

⁶⁸ Brown *et al.* *ADR and Practice* 17-014.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² UNCITRAL 'NY Convention (1958)' *op cit* article 4(1); Van Den Bergh *op cit* 250.

⁷³ *Ibid.*

⁷⁴ LSSA 'Electronic Signatures for SA Law Firms' 6 at

<file:///C:/Documents%20and%20Settings/Julian/My%20Documents/Downloads/LSSA%20Guidelines_Electronic%20Signatures%20for%20South%20African%20Law%20Firms_October%202014.pdf>, accessed 20 June 2015.

⁷⁵ *Ibid.*

⁷⁶ Van Den Berg *op cit* 251.

⁷⁷ UNCITRAL 'Model Law on Electronic Signatures (2001)', article 6; article 7 at

<<http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>>, accessed 8 September 2015.

provision in article 3 for the functional equivalence between electronic and handwritten signatures by stating that they should all be treated equal.⁷⁸

The 'UNCITRAL Model Law on E-Commerce of 1996' does not contain a definition for an electronic signature, but instead contains only a provision dealing with situations where the law requires a signature.⁷⁹ Article 2(c) states that an online communication means information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.⁸⁰

The 'EU Directive on a Community Framework for Electronic Signatures of 1999' has offered a sufficient contrivance to attain a pragmatic online safety measure by affirming that electronic signatures and digital records have similar authority and legal validity as manually written documents.⁸¹ Article 5(2) states that as a general rule, an electronic signature must not be deprived of legal consequence, effect or validity simply because it is digital.⁸²

The 'SA ECTA 25 of 2002', article 1, s.v. 'data' defines data as electronic representations of information in any form.⁸³ An 'electronic signature' is defined as data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature.⁸⁴

The 'UK's Electronic Communications Act of 2000', article 7 implements the 'EU Electronic Signatures Directive of 1999'.⁸⁵ To this effect the 'UK's Electronic Communications Act 7 of 2000', article 7(1) states that in any legal proceeding, an electronic signature that is included into or reasonably related to a specific online communication, will be deemed admissible in evidence with regards to any inquiry on the authenticity or legal validity of the online communication or online data or with regards to the integrity of its contents.⁸⁶

The 'NY Convention', article 2(2) states that any provision must be incorporated in an agreement that was duly signed or included in an interchange of correspondence by letter or telegram.⁸⁷

The 'SADC Model Law on Electronic Transactions and E-Commerce of 2012', article 1, s.v. 'electronic signature' states that an electronic signature

⁷⁸ UNCITRAL 'Model Law on Electronic Signatures (2001)' *op cit* article 3.

⁷⁹ Eiselen *op cit* 5.

⁸⁰ UNCITRAL 'Model Law on Electronic Signatures (2001)' *op cit* article 2(c); Eiselen *op cit* 5-6.

⁸¹ EU Commission 'Directive on a Community Framework for Electronic Signatures (1999) (99/93/EC OJL 13)' *op cit* article 5(2); Hill 'Online Arbitration' *International Arbitration* 15(2) (1999) 199.

⁸² *Ibid.*

⁸³ 'SA ECTA 25 of 2002', article 1 s.v. 'Data'; Eiselen *op cit* 3.

⁸⁴ 'SA ECTA 25 of 2002', article 1 s.v. 'Electronic Signature'; Eiselen *op cit* 3-4.

⁸⁵ EU Commission 'Electronic Signatures Directive (1999/93/EC)', s.p. at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:en:HTML>>, accessed 11 July 2015; 'UK's Electronic Communications Act 7 of 2000', article 7(1); Hill *op cit* 199.

⁸⁶ EU Commission 'Electronic Signatures Directive 1999/93/EC' *op cit* s.p.; 'UK's Electronic Communications Act 7 of 2000', article 7(1); Hill *op cit* 199.

⁸⁷ UNCITRAL 'NY Convention (1958)' *op cit* article 2(2); Hill *op cit* 199.

means data, and that this includes an electronic sound, symbol or process, executed or adopted to identify a party and to indicate that party's approval or intention in respect of the information contained in the online communication and which is attached to or logically associated with such online communication.⁸⁸

4. THE RECOGNITION AND ENFORCEMENT OF THE OUTCOME OF AN ONLINE ARBITRATION PROCEEDING

The online arbitration agreement permits the parties to determine the award's rules of enforcement.⁸⁹ The law of contract ensures that the unsuccessful party adheres to the award.⁹⁰ When a party refuses to comply, a national court will have to be approached to compel observance. However, other means of enforcement, *i.e.* blacklisting, cancellation of services, conciliation, dialogue, litigation, mediation, unfavourable exposure, *etc.* also exist.⁹¹

Currently, the enforcement of awards is still based on service provider arrangements and other institutional arrangements and not on the Internet as medium of enforcement. Any mean of enforcement can be used to compel observance of an award, as long as it is fair and reasonable.⁹²

This section will evaluate if the Internet can, without national courts, enforce online arbitration award in cyberspace.⁹³ As a result, the requirements for a valid award, the publication of the award, the fact that awards are final as well as the way in which awards are enforced will be looked at.

4.1. Requirements for a Valid Online Arbitration Award

In the event that a party or a service provider seeks the court's assistance to enforce an award, either in terms of the 'SA Arbitration Act', article 31 or as an order for the performance of a contract, comply with certain requirements:⁹⁴ firstly, article 24 requires it to be in writing and signed by the arbitrator/panel.⁹⁵ Secondly, it must be clear who must do what, and if money is involved, the exact amount.⁹⁶ Thirdly, it must be final in the sense that it must have dealt with all the

⁸⁸ SADC 'Model Law on Electronic Transactions and E-Commerce (2012)' *op cit* article 1 s.v. 'Electronic Signature'.

⁸⁹ Johnson *et al. op cit* 1367.

⁹⁰ Collins *et al. op cit* 605.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ Johnson *et al. op cit* 1368.

⁹⁴ 'SA Arbitration Act 42 of 1965', article 31; Butler, Finsen *op cit* 260; Ramsden *op cit* 182-196.

⁹⁵ 'SA Arbitration Act 42 of 1965', article 24; Butler, Finsen *op cit* 260; Ramsden *op cit* 158-160.

⁹⁶ Butler, Finsen *op cit* 261; Ramsden *op cit* 176-177.

disputes submitted to the arbitrator.⁹⁷ Fourthly, it must be capable of being enforced.⁹⁸ Lastly, it must be legal.⁹⁹

The 'Model Law on ICA', article 31(1) also states that it must be in writing and signed by the arbitrator/panel.¹⁰⁰ Article 31(3) states that it must contain the date and place of arbitration.¹⁰¹

4.2. Publication of the Online Arbitration Award

The SA common law position on the publication of an award is that the arbitrator must divulge it when both parties are present, unless they agreed that it may be published in the other's absence.¹⁰² The common law position is so strict, that if the award was published in the absence of a party, even if they were lawfully summoned, the outcome of a proceeding is *ipso iure null*.¹⁰³

4.3. Online Arbitration Appeal to be Final with No Appeal to the Courts

The 'SA Arbitration Act', article 28 provides for an award to be final and not subject to appeal to a court.¹⁰⁴

The 'Model Law on ICA', article 33(3)-(5) provides for a party to request within 30 days that the panel make an additional award if any of the claims presented to the arbitration tribunal were omitted from the award, and for the additional award to be made within 60 days.¹⁰⁵

4.4. The Enforcement of the Online Arbitration Award

4.4.1. WG.III's 28th Session: 'Overview of Private Enforcement Mechanisms'

At WG.III's 22nd Session, a need was expressed to enforce the outcome of an online arbitration procedure by a simpler enforcement mechanism than

⁹⁷ Butler, Finsen *op cit* 262; Ramsden *op cit* 160-165.

⁹⁸ Butler, Finsen *op cit* 263; Ramsden *op cit* 176-177.

⁹⁹ Butler, Finsen *op cit* 263; Ramsden *op cit* 182-196.

¹⁰⁰ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 31(1); Ramsden *op cit* 158; Butler, Finsen *op cit* 260-261.

¹⁰¹ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 31(3); Ramsden *op cit* 158; Butler, Finsen *op cit* 260-261.

¹⁰² Ramsden *op cit* 160; Butler, Finsen *op cit* 267 – 269.

¹⁰³ *Ibid*.

¹⁰⁴ 'SA Arbitration Act 42 of 1965', article 28; Ramsden *op cit* 161; Butler, Finsen *op cit* 271–272.

¹⁰⁵ UNCITRAL 'Model Law on E-Commerce (1996)' *op cit* article 33(3)-(5); Ramsden *op cit* 161; Butler, Finsen *op cit* 271 – 272.

what the 'NY Convention' makes provision for, due to the need for a practical and expeditious mechanism for low-value e-commerce disputes.¹⁰⁶

At WG.III's 27th Session the Secretariat was requested to provide a document that sets out an overview of private enforcement mechanisms.¹⁰⁷ That request was made in the context of a non-binding recommendation to be made by the neutral under Track II of the 'DPR', draft article 8 *bis*.¹⁰⁸

At WG.III's 28th Session the Secretariat submitted; 'Overview of Private Enforcement Mechanisms;' which will be looked at.¹⁰⁹

4.4.1.1. Working Group III did not define 'Private Enforcement Mechanisms'

The precise nature and meaning of 'private enforcement mechanisms' was not discussed by WG.III and, in the absence of such guidance, the note that WG.III distributed at its 28th Session; 'Overview of Private Enforcement Mechanisms;' considered the term to be defined as an alternative to a court-enforced arbitration award or settlement agreement, and which can either create incentives to perform or make provision for the automatic execution of the outcome of a proceeding.¹¹⁰

4.4.1.2. Private Enforcement Mechanisms should be incorporated into 'UNCITRAL's Technical Notes on ODR of 2016'

'Overview of Private Enforcement Mechanisms' sets out certain examples that WG.III looked at in an attempt to adapt the 'Technical Notes' to existing enforcement mechanisms.¹¹¹

Neither the 'DPR', nor the 'Technical Notes' made any provision for private mechanisms to be incorporated as part of the OADR proceedings.¹¹² Rather, the 'DPR' Draft Preamble, section (2)(d) anticipated a separate 'Annexure of Cross-Border Enforcement Mechanisms.'¹¹³ There exists, as 'Overview of Private Enforcement Mechanisms;' sets out, many different

¹⁰⁶ WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.43; par.98.

¹⁰⁷ WG.III 'ODR for Cross-Border E-Commerce Transactions' (22nd Session, A/CN.9/WG.III/WP.105)' *op cit* par.2; par.24(a).

¹⁰⁸ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.57.

¹⁰⁹ WG.III 'Overview of Private Enforcement Mechanisms (28th Session A/CN.9/WG.III/WP.124)' at <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/863/44/PDF/V1386344.pdf?OpenElement>>, accessed 15 August 2015.

¹¹⁰ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.4.

¹¹¹ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.14-par.42.

¹¹² WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.9.

¹¹³ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* Draft Preamble, draft section 2(d).

mechanisms.¹¹⁴ These mechanisms are largely dependent on third parties, such as payment service providers (PSPs) in the case of chargebacks, or on OADR service providers that has control over the payment flows of an e-commerce transaction.¹¹⁵ UNCITRAL may want to look at how the OADR system it devised can work alongside such systems, when it compiles the intended the 'Annexure of Cross-Border Enforcement Mechanisms to the UNCITRAL Technical Notes on ODR of 2016'.¹¹⁶

WG.III acknowledged that a built-in enforcement mechanism in the OADR process would entail many advantages to both parties and OADR service providers, especially since it would provide a once-of resolution.¹¹⁷ UNCITRAL may want to look at matters that may arise should service providers seek to control financial flows as well as serve an OADR function, such as should an OADR service provider also decide to provide an escrow account or delayed payment function as part of online arbitration?¹¹⁸

4.4.1.3. Oversight over Private Enforcement Mechanisms

It could lead to many problems if online merchant advertises their use of the 'Technical Notes', but if there are no oversight mechanisms that will ensure that the 'Technical Notes' were in fact being used by that online merchant in whole or in part or that it is correctly applied.¹¹⁹

Linking a trustmark to UNCITRAL, with the latter as an oversight body, however presents problems, since the UN General Assembly's decision in 'Official Seal and Emblem of the UN 1946', Recommendation A prohibits the use of the UN's logo for commercial or non-official purposes.¹²⁰

An online merchant could, however, advertise its resolution of disputes *via* a certain service provider on its website, and that provider could be accredited or trustmarked, by either a state or non-governmental body, by reference to its use of the 'Technical Notes'.¹²¹

4.4.2. Types of Private Enforcement Mechanisms

¹¹⁴ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.9.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.10.

¹¹⁸ *Ibid.*

¹¹⁹ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.12.

¹²⁰ UN 'Official Seal and Emblem of the UN 1946 UN General Assembly 49 A/RES 92(i) (7 December 1946)', Recommendation A at <<http://www.worldlii.org/int/other/UNGA/1946/49.pdf>>, accessed 15 August 2015.

¹²¹ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.13.

Three different types of private enforcement mechanisms could be of relevance to the 'Technical Notes' and they are distinguished by their purpose.

Firstly, there is the type which has a bigger focus on providing incentives for online merchants to voluntarily comply with Negotiation Phase agreements, Facilitated Settlement Phase recommendations and online arbitration awards made during the Final Phase of the 'Technical Notes'. Examples are review systems and trustmarks for online merchants and service providers.

The second type has a focus on providing an automated execution of Negotiation Phase agreements, Facilitated Settlement Phase recommendations and online arbitration awards made during the Final Phase. Examples are chargebacks, credit card chargebacks that sit in the transaction channel and escrow accounts. Three different case studies will be looked at: ICANN's UDRP system, the eBay and PayPal system and the credit card chargeback that sits in the transaction channel.

Lastly, alternative private enforcement mechanisms will be looked at.

4.4.2.1. Incentivised Private Enforcement Mechanisms

This section will give an overview of incentivised private enforcement mechanisms and which could be included in the 'Technical Notes'.

4.4.2.1.1. Review Systems

An effective way for an online business to build trust is to invite online buyers to provide feedback and/or ratings after they have bought something.¹²²

UNCITRAL may want to look at whether ratings could also be used specifically in relation to an OADR mechanism, to invite online buyers to rate the compliance of an online merchant with the 'Technical Notes'.¹²³

UNCITRAL may want to look at the following questions in this regard, firstly, on what basis would ratings be given, and by whom?¹²⁴ By both parties to an e-commerce transaction or just the online buyer or just the online merchant?¹²⁵ Secondly, how should ratings be divulged to the public?¹²⁶ For example, should it be published on the website of the online merchant, or service provider?¹²⁷ If UNCITRAL decides on the website of the service provider, would it be sufficient to notify the public?¹²⁸ If UNCITRAL decides on the website of the

¹²² WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.17.

¹²³ WG.III 'Overview of Private Enforcement Mechanisms (28th Session--A/CN.9/WG.III/WP.124)' *op cit* par.18.

¹²⁴ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.19.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

online merchant, what would prevent an online merchant from publishing false or fraudulent ratings?¹²⁹ Thirdly, would negative ratings reflect disagreement with the OADR outcome or compliance with the outcome?¹³⁰

4.4.2.1.2. Trustmarks

Trustmarks are quality labels in the form of seals or logos granted by either service providers or independent third parties to online merchants, so that they could display them on their websites to inform online buyers that they have been certified by an independent third party as trustworthy.¹³¹

In the context of the 'Technical Notes', UNCITRAL may want to think about five matters in this regard:¹³² firstly, which third party would be prepared to evaluate the trust mark company?¹³³ Secondly, does a conflict of interest exist due to the fact that the awarding of a trustmark has a transactional component between the trustmark institution and an online merchant?¹³⁴ Thirdly, on which basis should trustmarks be granted?¹³⁵ Would criteria be uniform across trustmark institutions or could different trustmark institutions use different criteria?¹³⁶ Would a trustmark be issued to an online merchant simply because that online merchant uses the 'Technical Notes' or because it abided by decisions rendered by a neutral third party?¹³⁷ Fourthly, in the absence of a global system of accreditation, how would the trustmark institution itself be regulated?¹³⁸ Lastly, how will a global system of trustmarks work alongside existing regional systems of trustmarks?¹³⁹

4.4.2.2. Automated Execution Private Enforcement Mechanisms

Private enforcement mechanisms, in particular chargebacks, tend to be perceived as parallel OADR processes in themselves, within a system managed by a PSP, such as a bank or a credit card company, which has actual control over both the adjudicative process and the financial flows of the transaction.¹⁴⁰

¹²⁹ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.19.

¹³⁰ *Ibid.*

¹³¹ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.20.

¹³² WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.24.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.30.

UNCITRAL would need to consider how such mechanisms would be required to be integrated into the 'Technical Notes', and/or be required to be established in future.¹⁴¹

This section will give an overview of private enforcement mechanisms that makes provision for an automatic execution of Negotiation Phase agreements, Facilitated Settlement Phase recommendations and online arbitration awards made during the Final Phase.

4.4.2.2.1. Chargebacks

Self-execution can in some instances be implemented by means of a chargeback, which is a process whereby an online buyer disputes a charge and consequently requests reimbursement from the PSP. When a PSP has already passed the funds on to the online merchant, it then attempts reimbursement.¹⁴²

The PSP serves an adjudicative role by requesting information from the online buyer why s/he disputes the purchase and determines whether to grant the claim.¹⁴³ Some PSP's, such as Mastercard and Visa, have detailed process for such adjudicative functions.¹⁴⁴ UNCITRAL should set rules to ensure that PSP's do not have conflicts of interest with parties to a transaction.¹⁴⁵

The protection offered by chargebacks is limited to online buyers who buy with credit cards. Other forms of payment, such as debit cards, mobile phone payments, online banking-based Internet payments, *etc.*, are not subject to redress by such a mechanism.¹⁴⁶

UNCITRAL need to look at whether and how the roles and liabilities of a third party such as a PSP could be integrated into the 'Technical Notes'.¹⁴⁷

4.4.2.2.2. Escrow Accounts

Escrow accounts provide a broader scope of application than chargebacks because they apply more broadly than just to credit card transactions.¹⁴⁸ Under an escrow system, payment is made by the online buyer into a third party's account, and after a certain time period, when no complaints has been received, the money is disbursed in the online merchant's account.¹⁴⁹

¹⁴¹ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.32.

¹⁴² WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.35.

¹⁴³ *Ibid.*

¹⁴⁴ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.36.

¹⁴⁵ *Ibid.*

¹⁴⁶ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.38-par.39.

¹⁴⁷ *Ibid.*

¹⁴⁸ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.40.

¹⁴⁹ *Ibid.*

In the event there is a complaint, the escrow agent withholds payment until the dispute is resolved by means of OADR.¹⁵⁰

4.4.2.2.3. Case Studies

Successful online arbitration methods, such as those employed by ICANN's UDRP, eBay and PayPal, as well as credit card chargebacks, should be looked at because they are effective.¹⁵¹ They are successful because they do not rely on the courts to enforce their outcomes and because specific methods are used that are more adept for particular disputes.¹⁵² They could serve as models for the 'Technical Notes' or when UNCITRAL decides to compile a set of legal standards exclusively for online arbitration.¹⁵³

4.4.2.2.3.1. ICANN's UDRP

ICANN has compiled the 'Uniform Dispute Resolution Policy' (UDRP) which includes an OADR procedure and allows owners of trademarks to combat cybersquatting and applies to generic top level domains (gTLD's), although it has been adopted by some registrars who administer country-code level domains (ccLD's).¹⁵⁴ The outcome is enforced by means of adhering to the law of contracts.¹⁵⁵ Many jurisdictions have enacted their own laws that approximate the UDRP, such as the 'SA ADR Regulations' under the 'SA ECTA.'

Domain names are regulated by ICANN on a 'first applied, first awarded' basis.¹⁵⁶ This causes many disputes between the registrants and owners of trademarks as opportunists register domain names similar to trademarks to resell them at a profit to the trademark owners.¹⁵⁷

The UDRP is a mandatory administrative procedure that uses a form of documents-only arbitration proceeding.¹⁵⁸ The UDRP does however not adhere to the usual arbitration procedures, because, the panel does not provide reasons for their decisions, and parties may institute legal action in a national

¹⁵⁰ WG.III 'Overview of Private Enforcement Mechanisms (A/CN.9/WG.III/WP.124)' *op cit* par.41.

¹⁵¹ Cortés 'ODR Services' *Computer and Telecommunications LR*, p.173 at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477885>, accessed 28 November 2016.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ Cortés 'An Analysis of the UDRP Experience' *Computer Law and Security Report* 24(4) (2008) 349.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ Cortés 'An Analysis of the UDRP Experience' *op cit* 350.

court at any time during the procedure.¹⁵⁹ The UDRP is an independent legal system with its own unique features and which enforces its own decisions.¹⁶⁰

Since the UDRP is not arbitral in nature, it is not subject to arbitration laws, rules or regulations, and appeals or reviews are therefore not possible.¹⁶¹ The courts are the only ones who can reverse an UDRP decision, but the courts apply national trademark law and not the UDRP.¹⁶²

4.4.2.2.3.2. eBay and PayPal

eBay Inc. is a US e-commerce company that provides goods and services online.¹⁶³ In 2015 eBay and PayPal separated.¹⁶⁴

eBay and PayPal now has their own Dispute Resolution Centres (DRC's) to resolve ordinary disputes.¹⁶⁵ The advantage of having to resolve many similar disputes is that because the same issues re-occur, eBay and PayPal can categorise them.¹⁶⁶ Parties are usually eager to partake because online buyers can get redress and online merchants can get positive reviews.¹⁶⁷

If an agreement is not reached, the parties have to take part in online negotiation.¹⁶⁸ IT and software applications are then used that limit the space for free text, help to identify recommendations and proposals, set timeframes and even format the tone of the online communication.¹⁶⁹

The IT and software applications substitute the need for a neutral third party to guide the process because it intervenes in the online negotiations and allow the parties to formulate and reformulate the problem and solution.¹⁷⁰

eBay's DRC focuses on a limited number of issues *i.e.* bad descriptions of goods/services, delays, and negative feedback, while vehicle claims are deferred to NetNeutrals.¹⁷¹

¹⁵⁹ Cortés 'An Analysis of the UDRP Experience' *op cit* 350.

¹⁶⁰ Dinwoodie 'The International Intellectual Property Law System' *Marquette Intellectual Property LR* 10(2006) 207.

¹⁶¹ Cortés 'An Analysis of the UDRP Experience' *op cit* 365.

¹⁶² *Ibid.*

¹⁶³ eBay 'Global Trade', *s.p.* at <<http://pages.ebay.com/globaltrading/buyer/index.html>>, accessed 21 October 2016.

¹⁶⁴ PayPal 'Why are eBay and PayPal Separating?', *s.p.* at <<https://www.paypal.com/us/selfhelp/article/Why-are-eBay-and-PayPal-separating-FAQ3030>>, accessed 21 October 2016.

¹⁶⁵ NetNeutrals 'An Innovative Approach to Dispute Resolution', *s.p.* at <<https://www.netneutrals.com/About-Us.aspx>>, accessed 21 October 2016; Nagarajan *et al.* 'Leveraging the Wisdom of Crowds' *AC Resolution* (Winter 2010) 4; Schmitz 'Building Trust in E-Commerce through ODR', 16-18 at <<https://papers.ssrn.com/sol3/papers.cfm>>, accessed 21 October 2016.

¹⁶⁶ Rule OADR for Businesses *op cit* 103.

¹⁶⁷ Cortés 'ODR Services' *op cit* 173.

¹⁶⁸ Nagarajan *et al.* *op cit* 4.

¹⁶⁹ *Ibid.*

¹⁷⁰ Rabinovich-Einy *op cit* 253-258.

The software also uses a precedent system that recognises logarithms of common sources that leads to disputes.¹⁷² When eBay's DRC cannot resolve a dispute directly, the dispute is escalated to eBay's Resolution Services Team.¹⁷³

Information obtained is also used to build a dispute prevention strategy which targets causes of problems upstream.¹⁷⁴ Online buyers are also able to report fraud which is then investigated by an enforcement team.¹⁷⁵

4.4.2.2.3.3. Credit Card Charegeback that Sits in the Transaction Channel

The main advantages of the credit card chargeback system where the dispute resolution model sits inside the transaction channel are sevenfold: firstly, the dispute resolution model sits in the payment channel, so online buyers know that it is available and how to access it.¹⁷⁶ The decision is secondly executed within the self-contained system as the payment channel can divert money from one side of the payment channel to the other.¹⁷⁷ Online merchants that use the payment system are thirdly bound to use the dispute resolution system, with the result that it keeps online merchants bound to the dispute resolution process.¹⁷⁸ Parties, fourthly, always have recourse to the courts.¹⁷⁹ These systems are fifthly funded by means of a fee charged to the online merchant, which increases for defaulting online merchants, and with each chargeback.¹⁸⁰ The system in other words encourages resolution to avoid chargeback fees.¹⁸¹ The payment channels also collect information to build track records of online merchants to detect fraud.¹⁸² Sixthly, payment service providers (PSP's) discern between online merchants and buyers with good standing and not-good standing by identifying defaulting or fraudulent online merchants and online buyers from the front-end of the transaction, and to report when it happens.¹⁸³ Seventhly, since

¹⁷¹ Rabinovich-Einy *op cit* 253-258.

¹⁷² Cortés 'ODR Services' *op cit* 174.

¹⁷³ Del Duca *et al.* 'eBay de Facto Low Value, High Volume Resolution Process' *Yearbook on Mediation and Arbitration* 6(2014), p.3-4 at <<http://www.colinrule.com/writing/ebaydd.pdf>>, accessed 5 December 2016.

¹⁷⁴ *Ibid.*

¹⁷⁵ eBay DRC 'Resolution Centre', *s.p.* at <<http://resolutioncenter.ebay.com/>>, accessed 21 October 2016.

¹⁷⁶ Erdle 'Will UNCITRAL Dispute Resolution Rules Work for Consumers?', *s.p.* at <<http://www.slaw.ca/2012/12/04/will-uncitral-online-dispute-resolution-rules-work-for-consumers/>>, accessed 11 November 2016.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Erdle *op cit s.p.*

¹⁸¹ *Ibid.*

¹⁸² Gross *op cit s.p.*

¹⁸³ *Ibid.*

online PSP's handles money, they can simply divert money already paid to the online merchant once the dispute is resolved.¹⁸⁴

5. CONCLUSION

The legal requirements for fair and efficient online arbitration, the IT and software applications demand that arbitration must alter its legal and technical requirements to accommodate online arbitration.

Online arbitrations should overcome all of the challenges that civil law procedural and substantive requirements present and to adapt wholly to virtual reality so that it could function in its entirety in cyberspace.

Caution should be exercised that the IT and software applications used does not adversely impact on the right on a fair proceeding by focusing only on enhancing the right to an efficient process to the detriment of the legal requirements. Service providers and online arbitrators should in other words seek a balance between the requirements of the right to an effective technical proceeding and the right to a fair legal proceeding.

From this chapter it follows that the enforcement of the outcome of an online arbitration proceeding is currently still the weakest point of online arbitration as well as the aspect which faces the most challenges.¹⁸⁵ Enforcing an award through a national court of law is onerous, as it entails a long waiting period, the serving of notice on the other party, the drafting of documents, the presentation of evidence as well as the possibility of an appeal. Even if this goes rather fast, it will still take time to compel observance of an award after it has been rendered. It is therefore evident that parties would want to circumvent the court enforcement of an award and that they would seek its enforcement in a way that is more time efficient and economic.

Parties should concur on *extra curiam* means of enforcement to guarantee the enforcement of an award beforehand by means of the law of contract. The possibility of the deregistration and/or transfer of an online merchant's domain name, escrow agreements, seals and trustmarks are also feasible options at the first level phases of enforcement.¹⁸⁶

Due to its singular characteristics, online arbitration requires a distinct set of provisions that will regulate the rendering, recognition and enforcement of online arbitration awards and that will guarantee its enforcement.¹⁸⁷

¹⁸⁴ Gross *op cit s.p.*

¹⁸⁵ Thornburg 'Going Private' *University of California Davis LR* 34(2000) 151.

¹⁸⁶ *Ibid.*

¹⁸⁷ Rule OADR for Businesses *op cit* 208.

CHAPTER 5:

THE TECHNICAL CHARACTERISTICS OF THE INTERNET AND ONLINE ARBITRATION

1. INTRODUCTION

In cyberspace, important aspects that relates to legal and technical certainty, such as when, where and by whom, are not always clear.¹ It is therefore essential for any online arbitration agreement to make sure that both the special operation features of the agreement and the specific characteristics of cyberspace are considered carefully.² IT should enable the online arbitrator to resolve the dispute on the online arbitration platform.³

The technical requirements of an online arbitration proceeding determines the perspective from which the online arbitrator will view the dispute, the manner in which the parties will conduct their presentations, the time regulation of the proceeding, the time exigency of the dispute, the outcomes of and options at hand, as well as the entire structure of the resolution of the dispute.⁴ Additionally, the IT, technical and online communication requirements supply online arbitrators with the facts and details about the online dispute as well as how the parties view their sides of the dispute.⁵ E-commerce disputes and online arbitration, in other words, cannot be seen to exist in a vacuum but are embedded by IT and the Internet in cyberspace, while software applications allow the parties to interact with one another.⁶

From this viewpoint, Chapter 4 will firstly assess the technical requirements of the Internet, by looking at the technical self-regulatory framework of the Internet, the distinctive technical characteristics of the Internet, the transcendental character of the Internet from a technical perspective and its consequences for jurisdiction and the applicable law in cyberspace and the distinctive technical requirements of online arbitration.

Secondly, it will look at the technical requirements of online arbitration by focusing on the ability of the parties to communicate, the high speed of online communication versus the requirement of due process, the interrelationship between the confidentiality of the proceeding and the publication of the outcome of the proceeding, the securing of online communications, information

¹ Katsh 'The Online Ombuds Office' at <<http://www.umass.edu/dispute/ncair/katsh.htm>>, accessed 10th of May 2014.

² Lessig 'Reading the Constitution on Cyberspace' *Emory LJ* 45(3)(1996) 895.

³ Reidenberg 'Lex Informatica' *Texas LR* 76 (1998) 553.

⁴ Goldberg *et al.* 'Fitting the Forum to the Fuss' *Negotiation Journal* 10(1)(1994) 49.

⁵ *Ibid.*

⁶ *Ibid.*

management and safe information storage, as well as the definition of standards for technical solutions of online arbitration.

2. THE TECHNICAL SELF-REGULATORY FRAMEWORK OF THE INTERNET

Governments may well apportion or delegate their functions to institutions which are more proficient to perform a certain function.⁷ Examples are the relationship between the USA government and the National Aeronautics and Space Administration (NASA) or the relationship between the SA government and the Internet Corporation for Assigned Names and Numbers (ICANN). A similar situation especially exists with regards to the Internet as certain cyberspace-related institutions better understand the complex phenomenon of cyberspace than governments, and would like to see the growth and expansion of cyberspace.

Cyberspace-related institutions then also delegate the rule-making functions that go along with the administration of their respective fields. Since they are not authorised to promulgate legislation themselves, they exercise their rule-making functions by means of consented codes of conduct, procedures, rules or standards. When these codes of conduct, procedures, rules or standards are voluntarily implemented by the individuals or groups who had become voluntary members and who had consented when they took up membership to be bound by these rules, it amounts to the self-regulation of that institution.⁸ Since the members agreed beforehand that these self-regulatory codes, procedures, rules or standards will administer this field, and because the institution administers these rules on an equal basis between all members, it ensures that within a given field, within a given group, given situations are all dealt with equally, and in that way a certain field gets regulated.⁹

With the exception of authoritarian regimes such as those in China and North Korea who strictly control the Internet, the attributes of the Internet's infrastructure encourage many facets of self-regulation.¹⁰ Legislators find it difficult to extend their jurisdiction over behaviour which occurs in cyberspace and this has consequences for the sovereignty principle.¹¹

The Internet invites self-regulation, while state-based legislators struggle to extend their jurisdiction over conduct occurring on the Internet that effects

⁷ Johnson *et al.* 'Law and Borders', *Stanford LR* 48(1996) 1367; Akdeniz *et al.* *The Internet, Law and Society* 27.

⁸ Johnson *et al.* *op cit* 1367.

⁹ *Ibid.*

¹⁰ Johnson *et al.* *op cit* 1368.

¹¹ *Ibid.*

their jurisdiction.¹² This is because the Internet has an international character because it is a network of computer networks from all over the world that are coupled together.¹³ Sovereign attempts to control cyberspace become ever more extraneous, with the result that governments are combining forces with self-regulatory cyberspace-related institutions to regulate the technical aspects of the Internet.¹⁴

Against this background, it is consequently clear that a need exists for a negotiated regulatory regime to administer not only the online environment, but also online arbitration *per se* within the online environment. To administer the online environment, governments have for some time already encouraged self-regulation by the private sector without dictating how e-commerce and online arbitration should be performed.¹⁵

Governments need to guarantee the right of access to court and enable the co-ordination of policy making on commerce and trade, while the administration of the Internet should be conferred on international and national self-regulatory institutions.¹⁶ Consequently, governmental interference in the private law component of online arbitration should be kept at a minimum.¹⁷ Such an approach to the *lex electronica arbitralis* is reasonable as governmental regulation of online arbitration could prove to be too confining for the development of e-commerce and eventually lead to a patchwork of discrepancies of national arbitration regimes.¹⁸ The *lex electronica arbitralis* requires a proper sense of balance between government intervention and self-regulation.¹⁹ Governments should firstly play a diminished role in dispute resolution in cyberspace, but states should secondly, capitalise on the potential that the Internet and e-commerce present.²⁰

No doubt will the uncoordinated regulation of both cyberspace and online arbitration imperil the future expansion and efficacy of the Internet and the *lex electronica arbitralis*; it therefore has to be coordinated.²¹

¹² Johnson *et al. op cit* 1368.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ Johnson *et al. op cit* 1367.

²¹ *Ibid.*

3. THE DISTINCTIVE TECHNICAL CHARACTERISTICS OF THE INTERNET

The current international commercial arbitration regime's regulatory structure was established in the pre-Internet era in a time when the fax, post, telegram and telephone were the only tools for communicating over a distance. Due to considerable technical advances, the legal framework struggles to keep up and this causes problems for both e-commerce and online arbitration. While the current international commercial arbitration regime was still compiled in an era when jurisdiction was fixed, online arbitration now occurs in trans-jurisdictional cyberspace.²² Indeed, unlike the fax, post, telegram or telephone, the Internet is more than just a different communication mean. While technically the Internet forms part of the latest advancement in an elongated sequence of technical innovations over the ages, it also outlines a multifaceted online communication network that provides users of the Internet with previously unknown system features, which differentiates it from other forms of media.²³

Although other types of media collectively present many individual characteristics of the Internet, none of them are as all-encompassing and significant and boasts all of the features that the Internet has. In general, four main distinctions between the Internet and other online communication technologies can be discerned:²⁴ firstly, the Internet hosts a 24-hour global online market.²⁵ This enables online consumers to virtually shop at any time of the day or night, anywhere in the world. Equally, online merchants now also have global reach to online consumers anywhere in the world.

The Internet is not only a network of technical networks, it is also a network of relationships.²⁶ It is also not only a collection of different technologies and IT, but also a collection of online communities.²⁷ Since the Internet hosts virtual communities it is different from any other conventional technical innovation that typically served only their predetermined function, such as a telephone that could only have been used to phone.²⁸ The Internet's configuration can be compared to that of a real, albeit virtual, society that functions as a whole self-sustainable society with cybercourts, online banking, online commerce, online education, online health care, *etc.* Almost everything

²² Goldsmith *et al.* 'Grounding the Virtual Magistrate' NCAIR Dispute Resolution Conference Washington, DC (1996) p.11, available on <<http://www.umass.edu/dispute/ncair/groundvm.htm>>, accessed 24 February 2013.

²³ *Ibid.*

²⁴ Heiskanen 'Dispute Resolution in International E-Commerce' *Journal of International Arbitration* 16(3) (1996) 32.

²⁵ *Ibid.*

²⁶ Lessig *op cit* 897.

²⁷ *Ibid.*

²⁸ *Ibid.*

that people do in real life also gets done in virtual communities, as it is just as possible to conduct commerce, exchange knowledge, to teach, *etc.* online.²⁹ The Internet is more than just a technical network in the sense that it is actually a self-sustaining community that is governed by its own rules and regulations.³⁰

Secondly, the Internet, allow for greater decentralisation.³¹ This is because IT enables many-to-many type of communication, unlike the older generations of communication which enabled one-to-one communication.³²

IT allows online communication to transcend physical reality as well as space and time in cyberspace.³³ IT has changed the users of the Internet's conception of distance, duration, time and space.³⁴ The Internet is for this reason not simply another or a new technical medium.³⁵ IT also assists users of the Internet with the appraisal, assessment, explanation, categorisation, processing, storing and recovering of data more than other mean of communication.³⁶

The Internet is the only technical mean that permits elements of many different types of communication to be performed online. It also permits online communication and e-commerce to be performed through a combination of online and offline technology, for example the telephone as well as a handheld device can be used.³⁷

The third distinction is that the Internet enables its users to communicate both synchronously and asynchronously with one another, in other words communication can occur both directly and indirectly.³⁸ The benefit of asynchronous communication is its 24 hour accessibility.³⁹ This means that during any time of day a party can transmit an e-mail, to be opened and read by the recipient at his/her convenience.⁴⁰

The fourth distinction is the Internet's interactivity and virtual reality.⁴¹ This allow dialogue between users by means of chat conference rooms, different online means, and web forums, for example audio and video conferencing.⁴² From behind their computer screens, interactive technologies bring participants

²⁹ Dueker 'Trademark Law Lost in Cyberspace' *Harvard Journal of Law, Technology* 9(2)(1996) 483.

³⁰ Katsch *Law in a Digital World* 14.

³¹ Perritt 'The Internet is Changing the Public International Legal System' *op cit* 885.

³² *Ibid.*

³³ Bordone *op cit* 175.

³⁴ Hurter 'An Analysis of a New State of the Art SA ODR System' *op cit* 780.

³⁵ Katsch 'Dispute Resolution in Cyberspace' *Connecticut LR* 28 (1996) 961.

³⁶ Cona 'Focus on Cyberlaw' *Buffalo LR* 45 (1997) 975.

³⁷ Sourdin T 'ODR'at

<<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan046580.pdf>>, accessed 22 May 2014.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Rule OADR for Businesses *op cit* 45.

⁴² *Ibid.*

together and translocate them from a corporeal environment to a virtual environment.

3.1. The Distinctive Characteristics of the Internet's bearing on Online Arbitration

The moment when the claimant, registers a dispute with a service provider, is the point in time when the process commences.⁴³ A user will go the web page of the service provider, fill out an online complaint form to request a proceeding, and once they then submit that claim form by clicking on 'I accept' to accept a service provider's terms and conditions, and on 'submit' to transmit the claim, the online dispute is e-filed.⁴⁴ The information provided by the claimant on the complaint form is then used by the online arbitrator to reach the defendant and to request the defendant to partake in the proceeding.⁴⁵

Thereafter the proceeding itself commences when the claimant and the defendant are invited to present their evidence on the online arbitration platform.⁴⁶ Evidence often has to be given by Skype and witnesses will have to be cross-examined on a live broadcast that is streamed at real time to all parties. On the basis of the evidence before him/her, the online arbitrator must reach a decision within a certain time limit, and publish the award on the online arbitration platform.⁴⁷ The successful party will then need to enforce the award.⁴⁸

If arguments and e-evidence cannot be transmitted or used during a proceeding, due to its unavailability or if the IT or software applications of the different parties are incompatible with the online arbitration platform or if the platform suffers from a technical error, the entire proceeding will collapse.⁴⁹

4. THE TRANSCENDENTAL CHARACTER OF THE INTERNET FROM A TECHNICAL PERSPECTIVE AND ITS CONSEQUENCES FOR JURISDICTION AND THE APPLICABLE LAW IN CYBERSPACE

A service provider, an online arbitrator and the parties will need to have a thorough understanding of the Internet's transcendental character from a technical viewpoint, since this cross-border medium will no doubt present

⁴³ Rule OADR for Businesses *op cit* 45.

⁴⁴ *Ibid.*

⁴⁵ Donahey *op cit* 125.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Hurter 'Dispute Resolution in Cyberspace' *op cit* 205-208.

challenges to the concepts of applicable law and jurisdiction when it comes to online communications and interaction.

An inherent characteristic of each computer coupled to the Internet is that it functions independently and that it is controlled by its own system administrator. The Internet does not consist of a top-down framework.⁵⁰

The structure of the World Wide Web (WWW) is of such a nature that when an online user clicks on a website that is administered from SA, a Hypertext Transfer Protocol (HTTP) link will appear to a web page on another website that could be administered from say, Botswana. So when the user goes from the SA website to the Botswana website by means of the HTTP link, his/her actions on the WWW are then also governed by another legal regime.⁵¹ Since different legal regimes can interact on a single website, the legal consequences of each action could be almost never-ending.⁵² Different websites are governed by different legal regimes and one website may be subject to different legal regimes at the same time.⁵³

Whenever an online user is logged in on the same address but from a different computer, the online user can carry out any task on the Internet as if s/he was logged on to his/her own personal computer (PC) at home.⁵⁴ A particular challenge in this regard exists in the form of software called 'Telnet' which permits a user to log on to a remote computer over the Internet.⁵⁵ Internet Protocol (IP) address evasion techniques exist and that this could potentially allow a party to circumvent the outcome of an online arbitration proceeding when, for instance s/he attempts to evade a jurisdiction that recognises a certain legal principle and to rather register in a jurisdiction that will be more beneficial to him/her.⁵⁶

Also, there is a practice which is commonly employed by Internet service providers, where they 'cache' copies of web pages that are accessed frequently.⁵⁷ According to the 'SADC Model Law on Electronic Transactions and E-Commerce of 2012', article 1 s.v. 'cache[d]', copies of the original web pages are cached at local servers in an attempt to increase the access speed of the Internet.⁵⁸ Access speed will be improved if a server which is nearer is accessed, instead of accessing a distant server.⁵⁹ An Internet user in Cape Town who browses a web page based on a server in NY, and a computer

⁵⁰ Hurter 'Dispute Resolution in Cyberspace' *op cit* 205-208.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Telnet 'Telnet' at <<http://www.xmarks.com/site/www2.rad.com/networks/1997/telnet/>>, accessed 22nd of Mar 2014.

⁵⁵ Goldsmith *op cit* 1221.

⁵⁶ Goldsmith *op cit* 1221; Johnson *et al. op cit* 1395.

⁵⁷ Davies *et al.* 'The Trouble with Bits' *Journal of Business Law* (July 1996) 426.

⁵⁸ SADC 'Model Law on Electronic Transactions and E-Commerce (2012)' *op cit* article 1 s.v. 'Cache'.

⁵⁹ Davies *et al.* 'The Trouble with Bits' *op cit* 426.

somewhere in the UK then retains a copy of that webpage for the benefit of other users that also access that same web page frequently according to web traffic.⁶⁰ Although Internet users may be accessing materials at a particular site, they could in fact also be accessing copies of the original material stored on a different computer, in another country, due to the process of caching and that users could argue that the material that they accessed and their doings on a certain website consequently does not fall under a certain jurisdiction or is not prohibited in terms of a certain law from a certain jurisdiction.⁶¹

Computers coupled to the Internet recognise each other's addresses by means of Internet Protocol (IP).⁶² Digital data is broken into separate packets of bits which are then sent across different networks to the recipient's IP addresses.⁶³ Different routes are followed by the packets of bits from computer to computer until they reach the recipient's IP address, where they are reconstructed by the recipient's server to its original form and format.⁶⁴ The networks that the packets of bits follow change from minute to minute and each packet gets transmitted via a different network.⁶⁵ Packet routing also has no centralised control.⁶⁶ To make maximum use of the available carrying capacity at any given time, each server in the network evaluates whether to provisionally hold packets of bits or send them on.⁶⁷ On the Internet the affordability and pace of data transmission are in other words not dependent on physical location, due to the fact that Internet users cannot know the physical location of the information that they access.⁶⁸ The Internet is engineered to work on the basis of a virtual landscape and not on geographical indications, and an online arbitrator must always make double sure that an act that was performed on a certain website was indeed subject to a certain legal regime or jurisdiction.⁶⁹

Since the methods through which online communication occur are not fixed, this has an effect on the choice of the law used to adjudicate the dispute and on the jurisdiction to which an award is subject to.

⁶⁰ Burk 'Jurisdiction in a World without Borders', *Virginia Journal of Law and Technology* 1(3) (Spring 1997) 37.

⁶¹ Chissick *et al.* *E-Commerce Law and Practice* 321.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Johnson *et al.* *op cit* 1370.

⁶⁸ *Ibid.*

⁶⁹ Leitstein 'A Solution for Personal Jurisdiction on the Internet' *Louisiana LR* 5 (Winter 1999) 565.

5. THE DISTINCTIVE TECHNICAL REQUIREMENTS OF ONLINE ARBITRATION

A party with a lot of experience of IT will necessarily be more equipped to deal with the technical requirements and IT and software applications of a proceeding.⁷⁰ S/he will also be more up to date with possible loopholes or how to circumvent certain matters to the disadvantage of another party with beginners' level prowess.

Software and hardware architecture, together with the Internet and IT, create the virtual environment in cyberspace.⁷¹ Unless the online arbitrator is also familiar with the technical architecture, unfair decisions might originate from online arbitrators who set about without sensitivity and a sense of context to the technical environment from which a dispute emerged.⁷²

Although it is not always feasible or possible to request an expert's opinion in court litigation, due to disproportionate high costs, an already full schedule of the expert, travel and accommodation expenses or a long traveling time, such requests can be more easily accommodated by online arbitration.⁷³ firstly, online arbitration fits well with the cyberspace values of flexibility and innovation and is therefore accommodating for experts to give their opinions.⁷⁴ IT can always adapt the platform's technical nature to suit the needs of an expert when s/he needs to give his/her opinion.⁷⁵ Experts can make use of an array of new technical methods on a platform, more than courts are able to.⁷⁶

Secondly, formal court-based adjudication lacks creativity and flexibility in finding solutions, while a proceeding or platform can always be restructured to accommodate the latest technology.⁷⁷ Online arbitration can always allow greater flexibility, particularly when processes and remedies are not prescribed.⁷⁸

Thirdly, online arbitration allows non-legally qualified persons, who may only have technical experience, to adjudicate in the fields of their specialist experience or knowledge.⁷⁹ An online arbitrator may be selected who either have far-reaching legal or technical practical experience in the specific factual

⁷⁰ Davis 'The First International Competition for OADR' *Journal of International Arbitration* 19(2002) 416.

⁷¹ Gibson 'Arbitration in Intellectual Property Disputes' *California International Practitioner* 8(1)(1997) 2.

⁷² *Ibid.*

⁷³ Gibson *op cit* 1-2.

⁷⁴ *Ibid.*

⁷⁵ Gibson *op cit* 2-3.

⁷⁶ *Ibid.*

⁷⁷ Gaitenby *et al.* 'E-Commerce, E-Disputes and E-Dispute Resolution' *Ohio State Journal of Dispute Resolution* 15(3)(2000) 705.

⁷⁸ *Ibid.*

⁷⁹ Gaitenby *et al.* *op cit* 705.

issues of the dispute.⁸⁰ An added advantage is that a better balance of expertise can also be provided when arbitrators combine their knowledge.⁸¹

Fourthly, because IT is complex, it requires expertise.⁸² In cases where the online arbitrators already have specialised knowledge and skills, the need for expensive expert opinions are reduced.⁸³

5.1. The Ability of the Parties to Communicate is Decisive for the Success of Online Arbitration

Online arbitration involves mainly graphics, words and videos that have to be communicated.⁸⁴ Rights and obligations have to be articulated, cases have to be made, past occurrences have to be recalled and communication between parties must occur, while staying within the parameters of the law of a certain legal jurisdiction.⁸⁵ For the resolution of a dispute, a party's ability to communicate with his/her adversary, or with a third party, is vital.⁸⁶ The means of communication, together with the choice of online arbitrator, the formulation of the terms of reference and the selection of evidence, will be determined according to the requirements of the online dispute.⁸⁷ Due process calls for appropriate opportunities of parties to present their cases and evidence online.⁸⁸ Due process can easily be endangered by a lack of sufficient or appropriate communication as it will necessarily diminish confidence in the proceeding, as well as lead to an insufficient justice.⁸⁹ The parties' demands for confidentiality and privacy are higher and of a more sophisticated nature than with traditional arbitration, and as a result, data management and security and publication are always a concern.⁹⁰ Lastly, because online arbitration involves the presentation of evidence for adjudication online, specific means of online communication are not only required, but must at the same time also be legally accepted and be able to withstand potential legal scrutiny by a national court by conforming to the national civil procedural law requirements of a given jurisdiction.⁹¹

⁸⁰ Blackman *et al.* 'ADR in Commercial Intellectual Property Disputes' *American University LR* 47 (1998) 1717.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Katsch, Rifkin *op cit* 99.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Katsch, Rifkin *op cit* 99.

5.2. High Speed Online Communication in Online Arbitration vs the Requirement of Due Process

High speed is one of the main attributes of Internet.⁹² Since online communication occurs faster, it enables a quicker outcome.⁹³ Online arbitration is specifically based on, and designed around high speed.⁹⁴

High speed also has its downside since a swift proceeding could impair the quality of justice, as well as increase the prospects for a violation of due process.⁹⁵

The Queen's Bench Division (Commercial Court) of the English High Court once had to decide a case that was about due process in a fast-track arbitration proceeding. In *Walkinshaw v Diniz* Thomas J of the Queen's Bench had to weigh the need for a proper opportunity to present arguments and evidence against the need for a fast-paced online arbitration proceeding.⁹⁶ The Queen's Bench found that in such a matter of due process it was the quality of the communication during the engagements, instead of the quantity of engagements, that was the overriding principle.⁹⁷

5.3. The Interrelationship between the Confidentiality of the Online Arbitration Proceeding and the Publication of the Outcome of the Online Arbitration Proceeding

Parties are usually given a guarantee by the service provider that the information obtained and inferences made during and after the presentation of arguments and evidence will not be published; except when it was agreed beforehand that the outcome of the proceeding may be used for statistical purposes, but with the parties remaining anonymous.⁹⁸ The publication of the outcomes of proceedings is important for statistical purposes to build confidence in online arbitration.⁹⁹

At the same time, another important reason why parties select online arbitration instead of litigation is due to the confidentiality and privacy that it affords when compared to litigation. Litigation occurs in the public domain, with all details being reported and even published in newspapers and law journals; information can easily be retrieved by anyone.¹⁰⁰ With this in mind, service

⁹² Kaufmann-Kohler, Peter 'Formula One Racing and Arbitration' *Arbitration International* 17(2001) 185.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Walkinshaw v Diniz* [2000]2 All ER (Comm)237; Kaufmann-Kohler *op cit* 38.

⁹⁷ *Ibid.*

⁹⁸ Katsch 'The Online Ombuds Office' *op cit s.p.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

providers should find solutions and strike a balance that make room for both confidentiality and privacy as well as the publication of results in statistical format.¹⁰¹

Since online arbitration occurs in cyberspace, confidentiality diminishes the further the information is transmitted from its source. Confidential online documents can, for example be sent to someone with the mere click of a button, while evidence could at the same time be deleted easily.¹⁰² Service providers and parties should agree on confidentiality and privacy that will bind all, from the onset of the proceeding, during the proceeding and after the proceeding.¹⁰³

Confidentiality is usually a *sine qua non* for the parties.¹⁰⁴ The 'Technical Notes' should be amended to construct an explicit positive duty on the parties to respect confidentiality, as a general obligation of confidentiality cannot be said to exist *de lege lata* in online arbitration.¹⁰⁵ Otherwise the parties can enter into an agreement with each other and the service provider to keep information confidential. An application for a civil law remedy for breach of agreement can also be made in instances where information was not kept confidential, but usually the damage has been done by that time.

Confidentiality can be broken down into at least three components, namely, firstly, the privacy of the proceedings themselves. Secondly, the confidentiality preceding the delivery of the online arbitration award (during this phase it must be determined whether online documents which were presented during a proceeding may also be presented at another proceeding or during litigation, and whether the parties may make the outcome of the proceeding public, *etc.*). Thirdly, the confidentiality of the proceeding after the award has been made, where aspects such as the publication of the finding or the award, or other elements in the record must be determined.¹⁰⁶

Online arbitration service providers usually all make provision for the privacy of the proceedings.¹⁰⁷ Adversaries, interested parties, interlopers, onlookers or the public are almost never permitted to be present at a proceeding, and such people also do not have a right to access the platform, the record of the proceeding or the award.¹⁰⁸ Without a password and a username they cannot access the platform. It is customary for service providers to treat proceedings confidential and to keep it private.¹⁰⁹

¹⁰¹ Katsch 'The Online Ombuds Office' *op cit s.p.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Paulsson *et al.* 'The Trouble with Confidentiality' *Arbitration International* 11(3)(1995) 303.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

5.4. Securing Online Communication, Information Management and Safe Information Storage

5.4.1. The Protection of Online Communications

Online communication has disadvantages:¹¹⁰ the information that is exchanged between an online buyer and an online merchant often comprises the only evidence for the performing of an online agreement, especially in cases involving payment by credit card or money transfers or PayPal payments.¹¹¹ This information must be presented as evidence of the e-commerce transaction to the online arbitrator and if the online buyer did not print the e-commerce transaction details, or erased the e-commerce transaction confirmation report e-mail from his/her Inbox as well as the Recycle Bin of his/her e-mail account, those details will be very hard to get hold of again.

Subsequent editing, by making alterations, erasing, or modifying of information may all occur and could prove to be difficult to detect. This could diminish the chances of probable cause being established.¹¹²

The 'SA ECTA', article 11 provides that information is not without legal force and effect merely on the grounds that it is completely or partly in the form of a data message, so there would have to be real evidence of such fraud before a SA court will throw evidence out.¹¹³ Also relevant is article 15, which provides (1) that in any legal proceeding, the rules of evidence must not be applied so as to deny the admissibility of a data message.¹¹⁴ This was confirmed by Gautschi AJ of the Witwatersrand Division of the High Court in *Ndlovu v Minister of Correctional Services and Another*.¹¹⁵

5.4.2. Sender's Responsibility to Secure Online Communication

In theory, the sender is responsible to protect the information that s/he transmits.¹¹⁶ If the validity of the message depends on its reception by the addressee, the sender bears the risk of late or non-delivery and of interception by third parties.¹¹⁷ In this respect, the 'SA ECTA', article 14 provides for the assessment of the integrity of a data message.¹¹⁸ Article 43 again stipulates that

¹¹⁰ Kaufmann-Kohler *op cit* 44.

¹¹¹ EU Commission 'Directive on E-Commerce (2000/31/EC.JO CE L 178/1)', article 10 at <http://www.esma.europa.eu/system/files/00_31.pdf>, accessed 15 February 2015.

¹¹² *Ibid.*

¹¹³ 'SA ECTA 25 of 2002', article 11.

¹¹⁴ 'SA ECTA 25 of 2002', article 11(1).

¹¹⁵ *Ndlovu v Minister of Correctional Services and Another* (2006) 4 ALL SA 165 (W).

¹¹⁶ Dickie *Internet and Electronic Law in the EU* 106.

¹¹⁷ *Ibid.*

¹¹⁸ 'SA ECTA 25 of 2002', article 14.

when a buyer pays by using his/her credit card or its information, the general rules of purchase transfer the burden of proof on the credit card company to secure the information that the buyer sends.¹¹⁹

The 'SA Consumer Protection Act (CPA) 68 of 2008', Part B, also regulates consumers' rights on privacy.¹²⁰

Service providers need adequate standards of online data protection and online access regulation to their websites and the online data that it contains.¹²¹ They could otherwise be held liable for negligence should access to their databases be obtained or when online data is intercepted.¹²²

6. DEFINING STANDARDS FOR THE TECHNICAL SOLUTIONS OF ONLINE ARBITRATION

The computer hardware and software that an online arbitration proceeding requires, must link and interact seamlessly with its counterparts. Other parties could be located anywhere in the world. The IT and software applications that an online arbitration service provider employs must be standard in the sector and the parties must be acquainted with it, it should be the best and most reliable that is available and it should also be readily available in all parts of the world, so that parties aren't excluded by exclusive IT and software which requires high costs and skills to operate.

A proceeding will be much more complex when each party uses its own IT or software application and when those IT or software applications are not compatible with those which the rest uses.¹²³

With these challenges in mind, the 'Technical Rules' requires comprehensive legal standards on how the online platform and online communications should be regulated, ranging from the security regulations of the online arbitration platform to the confidentiality and privacy of the proceeding.¹²⁴

7. CONCLUSION

Online arbitration will in the future be affected by the Internet, IT and software applications in two important ways; firstly, IT and software applications will evolve in new ways in which online arbitration will in future be conducted

¹¹⁹ 'SA ECTA 25 of 2002', article 43; Office of SA Consumer Goods and Services Ombud 'Advisory Note 10 on E-Commerce' at <<http://www.cgso.org.za/wp-content/uploads/2015/03/Advisory-Note-ECT-Act-v5pdf.pdf>>, available online on 20 June 2015.

¹²⁰ 'SA CPA 68 of 2008', Part B.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Collins *et al.* *Dicey, Morris and Collins on the Conflict of Laws* 605; Kaufmann-Kohler *op cit* 53.

¹²⁴ *Ibid.*

over the Internet.¹²⁵ IT and software applications will secondly also replace existing practices and procedures by means of automation and innovation.¹²⁶ Certain technical challenges that online arbitration will be confronted with will not only be inherent in the Internet itself as a medium, but will instead also be attributed to the users' inability to adapt their technical skills to successfully employ such technology to perform online arbitration.¹²⁷

The leitmotiv for an online arbitrator, as regards the technical requirements must always be how s/he can possibly incorporate online communication in the most effective way to encourage the maximum participation of the parties in his/her attempt to enhance the possibility of a legally valid outcome that can be enforced successfully.¹²⁸

A service provider is not supposed to merely convert the traditional arbitration proceeding into cyberspace; even though online arbitration does share similar characteristics with traditional arbitration, it differs significantly.¹²⁹ Online arbitration is significantly influenced by the technical requirements of the Internet as far as it concerns online communication and the use of IT.¹³⁰ Due to all the significant requirements that online arbitration have, it is not merely possible to just use the latest IT and software applications without thinking how it will impact on the legal requirements that have to be followed.¹³¹ Although online arbitration differs from traditional arbitration, the basic legal principles of traditional arbitration should nevertheless act as guiding principles for online arbitration.¹³²

Secondly, with regards to the technical requirements of online arbitration, it is important to exclude any reasonable doubt during a proceeding that an online communication that is presented as evidence has been tampered with, and technical means must be employed that can guarantee the authenticity and integrity of online communications and online evidence.¹³³

The 'Technical Notes' or set of legal standards that is exclusively focused on online arbitration will have to regulate the technical requirements that online communications must adhere to so as to constitute credible evidence.¹³⁴ The use of certain software protocols, like the Multipurpose Internet Mail Exchange Protocol, or the use of electronic signatures are but two possibilities for ensuring

¹²⁵ Gaitenby *et al. op cit* 705.

¹²⁶ *Ibid.*

¹²⁷ Gaitenby *et al. op cit* 706.

¹²⁸ *Ibid.*

¹²⁹ Rule OADR for Businesses *op cit* 243.

¹³⁰ Gaitenby *et al. op cit* 706.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ EU Commission 'Directive on E-Commerce (2000/31/EC JO CE L 178/1)' *op cit* article 9; Kaufmann-Kohler OADR 54.

the non-alteration and non-repudiation of an online communication.¹³⁵ A more traditional solution would be to transmit a copy of any online communication, for reference purposes, to an online notary public for safeguarding in the event that it will be needed as evidence.¹³⁶

Service providers must identify the possible risks inherent in the IT that they employ, and they should always make use of back-up technical means and have strict policies in place that will address all the possible risks that may occur.¹³⁷ Specific safeguarding measures for both service providers and parties during a proceeding are system access via username and password, user-friendly system instructions, the protection of the integrity of online communications and their safe storage.¹³⁸

To enable arguments and evidence to be easily presented and inspected, service providers must always strive towards the full compatibility of their operating system (OS) with the OS's of all the other parties, affected and authorised third parties, witnesses, certification authorities and experts who need to give their opinions *etc.* wherever they may find themselves in the world.¹³⁹

It will always be advisable for a service provider to reach an agreement beforehand with all parties, as well as the affected and authorised third parties, witnesses, certification authorities and experts who need to give their opinions *etc.* on the standard protocol relating to confidentiality and privacy that will be employed during the proceeding, as well as how the online communications will be managed, in other words on the protocols on how online communications are transmitted, received, stored, and how and whether they are available for scrutiny *etc.*¹⁴⁰

¹³⁵ Kaufmann-Kohler *op cit* 54.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

CHAPTER 6:

UNCITRAL WG.III'S DRAFT PROCEDURAL RULES ('DPR') AND EU LEGISLATION ON OADR

1. INTRODUCTION

WG.III negotiated the 'DPR on ODR for Cross-Border E-Commerce Transactions' since its 12th meeting until its 33rd Session.¹⁴¹ Unfortunately WG.III had been unable to reach consensus on the contents and nature of the 'DPR' and as a result UNCITRAL had to adopt the 'Technical Notes on ODR of 2016' instead.¹⁴²

This chapter will look at firstly, the objective of WG.III's 'DPR', as this impacts on the 'Technical Notes'. Secondly, the scope of the 'DPR'. Thirdly, the evolution of EU legislation on consumer disputes and online arbitration and the impact that it has had on the 'DPR'. Fourthly, the main challenges that prevented UNCITRAL's approval of the 'DPR'. Fifthly, at how the proposed 'Two-Track' solution came about, as well as alternatives to the 'Two-Track' solution. The challenges that the proposed 'Two-Track' solution had to overcome will also be looked at.¹⁴³

2. UNCITRAL WG.III'S 'DPR'

WG.III was mandated by UNCITRAL to draft procedural rules for the disputes that arise from cross-border, low-value e-commerce transactions as this field of law require coherent and comprehensive cross-border regulation.¹⁴⁴

WG.III's work on OADR began during its 22nd Session that was held in Vienna on 13 December to 17 December 2010.¹⁴⁵ It started by looking for unified legal standards for both B2B and B2C e-commerce disputes, but already at this first Session a difference of opinion occurred on whether the 'Draft

¹⁴¹ WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit s.p.*; WG.III 'Report of 33rd Session (A/CN.9/868)' *op cit s.p.*

¹⁴² WG.III 'Report of 33rd Session (A/CN.9/868)' *op cit s.p.*

¹⁴³ WG.III 'DPR (Track II) (30th Session Vienna, 20 – 24 October 2016 A/CN.9/WG.III/WP.130)', p.5-17 at <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V14/051/36/PDF/V1405136.pdf?OpenElement>>, accessed 23 August 2016.

¹⁴⁴ UNCITRAL 'A Guide to UNCITRAL', 7 at <<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>>, accessed 22 October 2016.

¹⁴⁵ WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit s.p.*

Procedural' Rules should combine or separate B2B and B2C transactions, when they devise a global system for the resolution of e-commerce disputes.¹⁴⁶

This section will firstly, look at the scope of the 'DPR'. Secondly, the 'One Track' and the 'Two Track' Solutions will be explained. Thirdly, excerpts from WG.III's 27th Session will be looked at, as they pertain to the 'One Track' and the 'Two Track' Solutions. Fourthly, the four different proposals made at WG.III's 30th Session will be looked at, because they have bearing on the 'One Track' and the 'Two Track' solutions. Fifthly, it will be looked at why the 'Two-Track Solution' was the most important attempt to overcome the impasse in the negotiations at WG.III.

2.1. The Scope of WG.III's 'DPR'

Since e-commerce has such a broad scope, WG.III had to limit the scope of e-commerce when they started to compile the 'DPR':

2.1.1. Both B2B and B2C

UNCITRAL's mandate to WG.III pertained to both B2B and B2C low-value e-commerce disputes, stating that WG.III should look at different approaches instead of a single set of procedural rules.¹⁴⁷

If UNCITRAL's mandate was limited to a B2B-only proposal, WG.III would have avoided complex consumer protection questions that have divided the Group.¹⁴⁸ A process that would have only focused on B2B disputes would however not have spoken to B2C e-commerce disputes which constitutes the greater part of all e-commerce disputes due to its low-value nature.¹⁴⁹

2.1.2. Low-value

At WG.III's 28th Session it was queried whether the term 'low-value' was clear enough for legal application.¹⁵⁰

Different viewpoints were however held on whether the term should be defined or not.¹⁵¹ On the one hand it was said that a definition would provide legal certainty on when the 'DPR' should be applied and that it is needed for online consumer protection purposes.¹⁵² On the other hand, it was stated that 'low value' is a relative concept that could change over time and which differs

¹⁴⁶ WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.41-par.48; WG.III 'ODR for Cross-Border E-Commerce Transactions (22nd Session A/CN.9/WG.III.105 *op cit* par.24-par.27.

¹⁴⁷ WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.14.

¹⁴⁸ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.18.

¹⁴⁹ *Ibid.*

¹⁵⁰ WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.23.

¹⁵¹ WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.25; par.31-par.32.

¹⁵² WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.25.

from country to country.¹⁵³ In this regard, WG.III recalled a decision from its 24th Session that all indicative information should be set out in an accompanying 'Guidelines to the 'DPR'.¹⁵⁴

It was also stated that it was anticipated that in practice, the service provider would determine the threshold of what would constitute a low-value transaction and that the proposed 'Guidelines to the 'DPR' should regulate this concept.¹⁵⁵

2.1.3. Expressly Agreed and falls within Scope of 'DPR'

With regards to the 'DPR's scope of application, draft article 1(a) stated that the 'DPR' would have been applicable whenever the parties had agreed that a dispute was to be resolved under the 'DPR'.¹⁵⁶

2.1.4. Separate and Independent Agreement

The 'DPR', draft article 1 *bis* stated that the arbitration agreement referred to in draft article 1 required a separate and independent agreement from the main transaction agreement.¹⁵⁷ The dispute resolution provision was supposed to have stated whether 'Track I' or 'Track II' of the 'DPR' would have been applied to a dispute.¹⁵⁸

2.1.5. Goods or Services Not Delivered or Not Delivered Correctly or that Full Payment was not Provided

According to the 'DPR', draft article 1(2), the 'DPR' would have only applied to claims (a) that goods or services were either not delivered, not delivered ontime, not charged or debited correctly, and/or not provided according to the agreement; or (b) that the full payment was not received.¹⁵⁹

2.1.6. Exhaustive List of Claims

The 'DPR', draft article 1(2) would have included an exhaustive list of claims; "[made] at the time of the transaction;" to accord with the 'UN Vienna

¹⁵³ WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.25.

¹⁵⁴ WG.III 'Report of 24th Session (A/CN.9/739)' *op cit* par.16; WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.25.

¹⁵⁵ WG.III 'Report of 28th Session (A/CN.9/795)' *op cit* par.26.

¹⁵⁶ WG.III 'DPR' (A/CN.9/WG.III/WP.133)' *op cit* draft article 1, par.12.

¹⁵⁷ WG.III 'DPR' (A/CN.9/WG.III/WP.133)' *op cit* draft article 1, par.12(1)(b).

¹⁵⁸ *Ibid.*

¹⁵⁹ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* draft article 1(2), par.29-par.31.

Convention on Agreements for the International Sale of Goods (CISG) of 1980'.¹⁶⁰

To provide legal certainty UNCITRAL should amend the 'Technical Notes', Section I s.v. 'Purpose of the Technical Notes', article 5 to read; "The Technical Notes are intended for use in disputes arising from cross-border low-value sales or service contracts concluded using electronic communications [for goods or services which were not delivered, not delivered in time, not properly charged or debited, not provided in conformity with the agreement, and/or that documents related to the goods were not furnished, or in instances where full payment was not received and/or the purchaser did not take delivery of the goods]"¹⁶¹

2.1.7. Applicable to the Extent that it does Not Conflict with Other Applicable Law

The 'DPR', draft article (1)3 stated that the 'DPR' would have governed the OADR proceedings and that its provisions would have prevailed, with the exception of instances where it would have been in conflict with law from which the parties could not derogate.¹⁶²

The 'Technical Notes' does not contain a similar provision.

2.1.8. Timeframe for claims

It should be remarked that neither the 'DPR' contained, nor does the 'Technical Notes' contain, a time frame in which a claim may be brought, and that it seems as if the online arbitration service provider should self set a limitation period.¹⁶³

UNCITRAL should include a specified time period in the 'Technical Notes', which is based on the 'UN Convention on the Limitation Period in International Sales of Goods of 1974', article 9 which sets out time periods for claims.¹⁶⁴ Such a recommended stipulated time period should not supersede any time period to institute claims as stipulated in national legislation.¹⁶⁵

¹⁶⁰ WG.III 'DPR (29th Session, NY, 24-28 March 2014(A/CN.9/WG.III/WP.127), par.35-par.36 at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/014/73/PDF/V1601473.pdf?OpenElement>>, accessed 22 October 2016.

¹⁶¹ WG.III 'DPR (A/CN.9/WG.III/WP.127)' *op cit* draft article 1(2)(a); draft article 1(2)(b); par.37; UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section I s.v. 'Purpose of Technical Notes'; article 5.

¹⁶² WG.III 'DPR (A/CN.9/WG.III/WP.127)' *op cit* draft article (1)3.

¹⁶³ WG.III 'DPR (A/CN.9/WG.III/WP.127)' *op cit* draft article 1; par.30.

¹⁶⁴ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A; section I s.v. 'Purpose of Technical Notes'; article 5; UNCITRAL 'Convention on the Limitation Period in the International Sale of Goods (1974)', article 9 at

<http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.htm>, accessed 5 November 2016.

¹⁶⁵ *Ibid.*

2.2. The One Track and the Two Track Solutions Explained

At WG.III's 26th Session two tracks in the 'DPR' were identified that was required to accommodate jurisdictions in which agreements to arbitrate that were concluded prior to a dispute are deemed to be legally binding on consumers, as well as jurisdictions where pre-dispute arbitration agreements are not deemed to be legally binding on consumers.¹⁶⁶

At WG.III's 27th Session a proposal to implement a Two-Track system, one track which would end in arbitration, and one track which would not, was formally laid on the table.¹⁶⁷

Countries whose laws rendered pre-dispute arbitration agreements not binding on online buyers presented a big problem because the inclusion of an arbitration phase in the 'DPR' or in the 'Technical Notes' would have been legally challenged in legal jurisdictions where such agreements are not deemed to be legally binding.¹⁶⁸

It was suggested that this challenge could be overcome by having a so-called 'Two Track' set of 'DPR', where one track would include a Negotiation Phase, a Facilitated Settlement Phase and an Arbitration Phase, and one track without an Arbitration Phase.¹⁶⁹ This would have been accomplished by the incorporation of alternative contractual provisions whereby parties to a transaction would have agreed to the use of the 'DPR', with different provisions for the application of a certain 'track'.¹⁷⁰

The 'DPR', draft article 8(1) *bis*, was an article which dealt with the switching over to an arbitration phase in instances where the parties had not been able to reach a resolution on how to resolve their dispute.¹⁷¹ Some legal jurisdictions then required a 'second-click' post-dispute arbitration agreement on the part of an online buyer in order to proceed to an arbitration phase.¹⁷²

A possible 'Third Track' was also suggested which would have made provision for a decision by a neutral third party which would not have amounted to a formal arbitration decision, but which would instead have been subjected to a private enforcement mechanism.¹⁷³

Out of these discussions it followed that the 'DPR' had to be designed so that it did not make provision for an automatic progression to an Online Arbitration Phase, so as to specifically accommodate online buyers from legal jurisdictions whose legislation does not make provision for binding pre-dispute

¹⁶⁶ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.14; par.15.

¹⁶⁷ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit*.

¹⁶⁸ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.14.

¹⁶⁹ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.15.

¹⁷⁰ *Ibid.*

¹⁷¹ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.16.

¹⁷² *Ibid.*

¹⁷³ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.20.

arbitration agreements, and who had also not agreed to a post-dispute arbitration agreement.¹⁷⁴

2.3. Into ‘Two Tracks and Back’: Excerpts of WG.III’s 27th Session

At the 27th Session, delegates again said that WG.III needed to devise a global system for OADR that would accommodate both the legal jurisdictions that makes provision for pre-dispute arbitration agreements to be binding on online buyers, and for those legal jurisdictions that does not.¹⁷⁵

2.3.1. B2B-only proposal

Certain delegates said that one possible way forward could have been for WG.III to first compile the leg of the ‘DPR’ that would have applied to B2B disputes only, and that the intention should then be to thereafter negotiate the issues of B2C disputes.¹⁷⁶

It holds water that the B2B-only proposal would have had the advantage of allowing WG.III to circumnavigate intricate consumer protection issues that had divided its progress.¹⁷⁷ However, by opting for this option, WG.III would have failed to take its mandate pertaining to low-value e-commerce disputes into account.¹⁷⁸

2.3.2. The Two-Track Implementation Proposal

At the same Session, other delegations proposed a ‘Two-Track’ solution whereby online merchants, at the time of the transaction, would generate two different ODR provisions, which would have depended on both the online buyer’s jurisdiction and status (whether it’s an online business or online consumer).¹⁷⁹ In terms of this proposal, online buyers from the jurisdictions of so-called ‘Group I’ States, where pre-dispute arbitration agreements are not binding, would, at the transaction stage, have been presented with a dispute resolution agreement which made provision for OADR with a non-binding result.¹⁸⁰ Online buyers from jurisdictions where pre-dispute agreements to arbitrate are binding on them, and merchant online buyers, would both have been presented with a dispute resolution agreement that would have made

¹⁷⁴ WG.III ‘Report of 26th Session (A/CN.9/762)’ *op cit* par.22.

¹⁷⁵ WG.III ‘Report of 27th Session (A/CN.9/769)’ *op cit* par.16.

¹⁷⁶ WG.III ‘Report of 27th Session (A/CN.9/769)’ *op cit* par.17.

¹⁷⁷ WG.III ‘Report of 27th Session (A/CN.9/769)’ *op cit* par.18.

¹⁷⁸ WG.III ‘Report of 27th Session (A/CN.9/769)’ *op cit* par.19.

¹⁷⁹ WG.III ‘Report of 27th Session (A/CN.9/769)’ *op cit* par.21.

¹⁸⁰ *Ibid.*

provision for OADR that ends with an Arbitration Phase, whenever an online merchant offered 'Track II' of the 'DPR'.¹⁸¹

Such a process would have required the online merchant to draw the following together: firstly, the billing or shipping address of the online buyer to identify his/her legal jurisdiction. Secondly, a determination on whether the purchase is for private or professional intents and purposes, to identify whether the online buyer is an online consumer or an online merchant.¹⁸² By employing this data, the online merchant's website would have automatically directed the online buyer to the correct OADR track.¹⁸³

2.3.3. The 'Two-Track' Implementation Proposal's Annex of 'Group I' and 'Non-Group I' Jurisdictions

The 'Two Track' solution would have required an 'Annex to the DPR' in order to identify the so-called 'Group I' and 'Non-Group I' legal jurisdictions, to inform online merchants how to direct online buyers to the relevant track of the 'Two-Track' proposal that their legal jurisdiction would allow.¹⁸⁴ For this system to work, it was said that a definition of 'consumer' would have had to be included in the 'DPR'.¹⁸⁵ It was also said that online buyers in 'Group I' countries could always agree to arbitrate post-dispute.¹⁸⁶

The compilation of an 'Annex' would have required all of the legal jurisdictions of the world to provide their information so that a database could be compiled and once compiled, such a database would have required to be updated.¹⁸⁷

It would however be difficult to list states in an 'Annex' according to their consumer protection laws, due to the diverse nature of legal provisions that can even be found among 'Group I' legal jurisdictions when it comes to pre-dispute arbitration agreements.¹⁸⁸ This is especially the case in common law jurisdictions, where case law and public policy develop the whole time, and which could cause such an 'Annex' to quickly become outdated.¹⁸⁹

¹⁸¹ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.21.

¹⁸² WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.22.

¹⁸³ *Ibid.*

¹⁸⁴ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.23.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.24.

¹⁸⁸ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.25.

¹⁸⁹ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.26.

2.3.4. The Self-Characterisation Proposal Directing a Party to a Certain Track at the Outset of a Transaction

A proposal was also made to decide on the specific language that was supposed to have been included in 'Track I', draft article 1, and 'Track I', draft article 2 to distinguish between 'Group I' states and 'Non-Group I' states by means of an 'Annex' attached to the 'DPR'.¹⁹⁰ This would ensure that online buyers from certain legal jurisdictions would not be subject to an arbitration track of the 'DPR', but rather only to the default 'Track II', to be presumed in the absence of any information, that would have led to a non-arbitration track of the proceeding.¹⁹¹

This proposal was motivated by a need of ensuring that an online buyer, when s/he is a consumer, is diverted to the correct track of the 'DPR' at the time of the transaction.¹⁹² This would have been made possible by a party firstly identifying whether s/he was from a state which did or did not deem pre-dispute agreements to arbitrate as binding in nature on consumers. Secondly, whether s/he was an online consumer or merchant.¹⁹³

Another part of this proposal stated that an 'Annex' of lists of legal jurisdictions that allows pre-dispute binding arbitration and those that does not, had to be compiled and that this could then direct users to either pre-dispute binding arbitration or to some other non-binding option, which would exclude the application of 'Track I' to online buyers in those legal jurisdictions.¹⁹⁴

It was said that such an approach would be practical as it only required online buyers to answer two questions: firstly, their billing or shipping address. Secondly, whether they are an online consumer or merchant. These answers, together with the list of countries in the proposed 'Annex', would have enabled an online merchant's website to automatically offer the appropriate dispute resolution provision to the online buyer.¹⁹⁵

The possibility nevertheless existed that certain online buyers could have been diverted to the wrong track.¹⁹⁶ It was also uncertain who was supposed to have maintained and updated the proposed 'Annex'.¹⁹⁷

¹⁹⁰ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* draft article 1; draft article 2; par.21-par.23; par.31.

¹⁹¹ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.31.

¹⁹² WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.33.

¹⁹³ *Ibid.*

¹⁹⁴ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.34.

¹⁹⁵ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.35.

¹⁹⁶ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.36.

¹⁹⁷ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.40.

2.3.5. Decision

After deliberation, it was decided that there had not been a preponderance of views to discard the 'Two-Track' system in favour of a B2B-only set of 'DPR' as a preliminary phase.¹⁹⁸

2.4. Four Different Proposals: Excerpts of WG.III's 30th Session

At WG.III's 30th Session, four different proposals were considered in relation to how the parties to a dispute could possibly have selected the applicable track of the 'DPR'.¹⁹⁹

2.4.1. The First Proposal

The first proposal suggested that draft article 1(a) of 'Track I' of the 'DPR' should determine that online buyers in legal jurisdictions in an 'Annex' thereto would be prevented to undertake OADR proceedings in terms of 'Track I' before the dispute had arisen.²⁰⁰ This proposal would have required legal jurisdictions to choose to be included in such an 'Annex'.²⁰¹ It was said that the UN General Assembly could possibly invite or request all UN member states to be included/excluded in the 'Annex', and that states could thereafter annually confirm their status.²⁰²

The advantage of this proposal would have been its simplicity because technology would have automatically generated a dispute resolution provision for 'Track I' or 'Track II' of the 'DPR', and this would then have been based on the answers the online buyer gave on the questions pertaining to his/her status and billing or shipping address.²⁰³

A disadvantage would have been that the 'Annex' would have required annual updating at a UN General Assembly session, and that inclusion/exclusion from the list would have had to be based on the decision of governments to be included/excluded.²⁰⁴ A state's decision on whether to be included/excluded in the 'Annex' would have been of a political nature and would have been guided by political, instead of legal, considerations.²⁰⁵

¹⁹⁸ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.30.

¹⁹⁹ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* section C.

²⁰⁰ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.58.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.60.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

2.4.2. The Second Proposal

The second proposal provided that the process would end in binding arbitration, but that a footnote at draft article 1(a) of 'Track I' would have indicated that pre-dispute arbitration agreements with online buyers hailing from certain legal jurisdictions would not be deemed legally valid in terms of the national law of those jurisdictions, and that awards from such agreements would not be enforceable.²⁰⁶ This proposal also suggested a change to draft article 1(a) so as to read; "For buyers who are located in certain states at the time of the transaction, a binding arbitration agreement capable of resulting in an enforceable award requires parties to the agreement to use Track I after the dispute has arisen."²⁰⁷ This part was seen as a functional equivalent to a 'second click', resulting in a post-dispute arbitration agreement.²⁰⁸

Included with the second proposal were also two model provisions, one for 'Track I', which read; "Subject to the provisions of Article 1(a) of Track I, any dispute, arising hereunder and within the scope of Track I providing for a dispute resolution process ending in a binding arbitration, shall be resolved by arbitration in accordance with Track I." A second proposal for Track II read; "Where, in the event of a dispute arising hereunder and within the scope of Track II providing for a dispute resolution process ending in a non-binding recommendation, the parties seek an amicable resolution, the dispute shall be referred for negotiation, and when that fails, facilitated resolution, in accordance with Track II."²⁰⁹

An advantage of the second proposal was that it could have accommodated both B2B and B2C transactions.²¹⁰ It avoided determining the residence of online buyers and an 'Annex'.²¹¹ However, the wording in draft article 1(a) of the second proposal; "buyers who are located in certain States;" would still have required an 'Annex' to be kept and updated.²¹²

The legal effect of the second proposal was to present a functional equivalent to a so-called 'second click', whereby an online buyer, when s/he submits a claim, would in effect consent to binding arbitration when s/he presents the claim.²¹³ This approach permitted the 'DPR' to be embodied in a single document, while simultaneously bridging the two tracks.²¹⁴

²⁰⁶ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.63; WG.III 'DPR (31st Session—A/CN.9/WG.III/WP.133)' *op cit* draft article 1(a).

²⁰⁷ *Ibid.*

²⁰⁸ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.63.

²⁰⁹ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* draft article 1; par.64.

²¹⁰ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.66; WG.III 'DPR (31st Session—A/CN.9/WG.III/WP.133)' *op cit* p.5, par.12(2).

²¹¹ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.66.

²¹² WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* draft article 1(a); par.66.

²¹³ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.96.

²¹⁴ WG.III 'Report of 27th Session (A/CN.9/769)' *op cit* par.15; par.21-par.44; WG.III 'DPR (A/CN.9/WG.III/WP.127)' *op cit* par.16-par.18.

2.4.3. The Third Proposal

In an attempt to bridge the diverging views expressed in relation to the first and second proposals, a third, almost compromise, proposal was put on the table, which focused mostly on changing articles 1, 6 and 7 of 'Track I' of the 'DPR'.²¹⁵ The third proposal anticipated a single set of 'DPR' that would have provided different outcomes.²¹⁶

This proposal sought a resolution mechanism that would have conformed to cyberspace, and accentuated the enforceability of the OADR agreement, procedure and outcome so as conform the 'DPR' to both cyberspace and e-commerce practice. It stated that the design of the 'DPR' should have taken the differences of legal systems of different states into consideration, and minimise the inconformity of the OADR mechanism to the legal system in which it operates, so that the 'DPR' could be implemented in as many jurisdictions as possible.²¹⁷

This proposal also evaluated the advantages and disadvantages of both 'Track I' and 'Track II' and summarised it as follow:²¹⁸

	'Track I'	'Track II'
Binding or non-binding	Binding	Non-binding
Application	Subject to consumer protection regulations	Not subject to consumer protection regulations
Degree of resolution	Complete resolution	In case of unsuccessful mediation, an unbinding recommendation
Cost and time of dispute resolution	Requires certain costs and time	In case of unsuccessful mediation, costs and time cannot be estimated, often higher and longer than in arbitration, as shown by current situation

²¹⁵ WG.III 'DPR(A/CN.9/WG.III/WP.133)' *op cit* draft article 1; draft article 6; draft article 7; WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.70.

²¹⁶ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.70.

²¹⁷ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.72.

²¹⁸ *Ibid.*

This evaluation indicated that ‘Track I’ and ‘Track II’ each had its advantages and disadvantages. The third proposal hoped to integrate these advantages.²¹⁹

The third proposal envisaged that as soon as a resolution was reached, it would have been the end of the proceeding.²²⁰ However, if a resolution could not be reached, the dispute would have, in terms of draft article 7, been referred to either Negotiation or Facilitated Settlement, depending on the service provider’s guidance on the options.²²¹ If a facilitated settlement could not be reached, three options still remained: arbitration (as referred to in draft article 7 of Track I) or a recommendation by a neutral third party as referred to in Track II), or a third, open-ended option.²²²

The Third Proposal would have shifted the keeping and updating of the proposed ‘Annex’ to the OADR service provider.²²³ OADR service providers would have had to obtain, manage and update the ‘Annex’ and advise the parties in accordance thereto.²²⁴

It was decided that it is not advisable that parties who had agreed to make use of the ‘DPR’ should, half-way through the process, be able to opt out of a final determination, irrespective of whether it is a recommendation or an arbitration award.²²⁵ It was also uncertain what the way forward would have been if parties weren’t able to agree on the proposed track and also what the nature of the third open-ended option would have entailed.²²⁶

It was also suggested that only online buyers from legal jurisdictions in which pre-dispute arbitration agreements were not binding should have been allowed to decide on the nature of the Final Phase, and that all other parties would be bound by their initial agreement made at the time of transaction.²²⁷ This proposal would also have required an ‘Annex’ to identify the various legal jurisdictions of the online buyers that would have been permitted to decide which option to follow for the Final Phase.²²⁸

²¹⁹ WG.III ‘Report of 30th Session (A/CN.9/827)’ *op cit* par.72.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² WG.III ‘DPR (A/CN.9/WG.III/WP.133)’ *op cit* draft article 7(1); draft article 7(2); draft article 7(3); WG.III ‘Report of 30th Session (A/CN.9/827)’ *op cit* par.72.

²²³ WG.III ‘Report of 30th Session (A/CN.9/827)’ *op cit* par.74.

²²⁴ *Ibid.*

²²⁵ WG.III ‘Report of 30th Session (A/CN.9/827)’ *op cit* par.83.

²²⁶ WG.III ‘Report of 30th Session (A/CN.9/827)’ *op cit* par.84.

²²⁷ WG.III ‘Report of 30th Session (A/CN.9/827)’ *op cit* par.85.

²²⁸ *Ibid.*

2.4.4. The Fourth Proposal

Lastly, a fourth proposal was also put on the table in an attempt to replace paragraph 1(a) of draft article 1 of the 'DPR'.²²⁹ It read; "Explicit agreement requires a separate, independent agreement from the online buyer that (a) disputes relating to the transaction and falling within the scope of the 'DPR', will be exclusively resolved through OADR proceedings and whether Track I or Track II of the 'DPR' apply to that dispute and; (b) for online buyers whose billing address is in a state listed in the 'Annex', that in certain states, including the state of the online buyer's billing address, a binding arbitration agreement capable of resulting in an enforceable award, requires that Track I is used after the dispute arose."²³⁰

This proposal envisaged a new article inserted after article 6, with more safeguards to online buyers.²³¹ This new provision would have consisted of two paragraphs: "(1) If the dispute resolution provision provides that Track I applies and the online buyer's billing address is not listed in the 'Annex', or if it provides that Track II applies, then the proceedings shall move to the applicable track pursuant to articles [...]. (2). If the dispute resolution provision provides that Track I applies, and the online buyer's billing address is listed in the 'Annex', the OADR service provider may suggest options to address the situation."²³²

The Fourth Proposal included elements of the First Proposal as it also envisaged an 'Annex', but of an informational, non-binding and non-exhaustive nature.²³³ A state would therefore have taken a policy decision on whether it wanted to be included on such a list, and such a decision would not necessarily have corresponded with its domestic law.²³⁴ While the First Proposal intended to divert the online buyer to the right Track through an automatic selection mechanism, the Fourth Proposal was based on the idea that it is not possible to guarantee that online buyers would never agree to pre-dispute arbitration agreement disputes in legal jurisdictions in which such decisions were not binding in nature.²³⁵

The Fourth Proposal also included elements of the Second Proposal.²³⁶ As such, the Fourth Proposal would have placed the onus on online merchants to notify online buyers with given billing addresses that are based in certain

²²⁹ WG.III 'DPR (Track I) (30th Session 20-24 October 2014, Vienna, A/CN.9/WG.III/WP.131), draft article 1, paragraph 1(a) at <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V14/051/98/PDF/V1405198.pdf?OpenElement>>, accessed 23 August 2016.

²³⁰ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.75.

²³¹ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* draft article 6; WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.76.

²³² *Ibid.*

²³³ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.77.

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.78.

listed legal jurisdictions that pre-dispute agreements to arbitrate is not binding in that given legal jurisdiction.²³⁷

The Fourth Proposal differed from the Second Proposal by making provision, when moving to an Arbitration Phase, for the OADR service provider to take appropriate action, such as notifying the parties that the online buyer's billing or shipping address was from a listed legal jurisdiction in the 'Annex'.²³⁸

2.5. Explanation that the 'Two-Track' Solution was the Most Important Attempt to Overcome the Impasse in the Negotiations amongst the National Delegations

The main argument between the USA and the EU and Canada, was whether or not online arbitration, was supposed to be compulsory, as this could entail that parties in cross-border low-value transactions would be denied access to the court system of certain legal jurisdictions.²³⁹ Although the USA favoured an approach of this nature, the EU delegation pointed to international treaties and their implications, while the Canadian delegation pointed to legislation, which left arbitration provisions without legal application.²⁴⁰ This important stumbling block should have been resolved at the beginning of the negotiations, instead of having stood over to each next session.²⁴¹ This had the negative impact of undoing all other decisions taken with regards to the 'DPR' and made progress effectively illusory.²⁴²

The 'Report' of WG.III's 26th Session shows that the proposed 'Two-Track' Solution was the most important attempt to overcome the impasse in the negotiations amongst the national delegations:²⁴³

"14. [T]here were broadly two perspectives: firstly, countries whose laws rendered pre-dispute agreements to arbitrate not binding upon consumers. Secondly, countries where no such laws were in place. The presence of an arbitration phase in the 'DPR' would be problematic in those countries where such agreements were not regarded as binding."²⁴⁴

²³⁷ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.78.

²³⁸ WG.III 'Report of 30th Session (A/CN.9/827)' *op cit* par.79.

²³⁹ Beynekhlef, Vermeys 'UNCITRAL DPR for ODR for Cross-Border E-Commerce Transactions', *s.p.* at <www.slw.ca/2013/01/21/uncitrals-draft-procedural-rules-for-online-dispute-resolution-for-cross-border-electronic-commerce-transactions-where-are-we-now/>, accessed 25 August 2016.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.1-par.4.

²⁴⁴ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.14.

“15. A suggestion to overcome this difficulty was to have a Two Track System of OADR, one track of which would include online negotiation, online facilitated settlement and online arbitration phases, and one which would not include an online arbitration phase. It was said this might be accomplished by the preparation of alternative provisions or provisions under which parties to a transaction could agree to the use of the ‘DPR’, with different provisions providing for the application of a different ‘Track.’”²⁴⁵

If WG.III adopted the ‘Two-Track’ solution for the ‘DPR’, an OADR service provider whose online platform offers online negotiation, online mediation and online arbitration as a continuous process (so that when online negotiations broke down, the parties could have moved on to online mediation, and if that broke down, they could have moved on to online arbitration) would have had to forewarn online buyers right at the beginning of the proceeding that the Online Arbitration Phase of the process is or isn’t mandatory depending on their billing or shipping address.²⁴⁶ An ‘Annex’ to the aforementioned report sets out two views how this would have been presented: firstly, it was suggested that a provision would have had to be included in the ‘DPR’ to have made provision for a procedure that would look at binding pre-dispute arbitration agreements, while simultaneously ensuring that the OADR process does not - without the online buyers consent - move on to online arbitration if the online buyer is resident in a legal jurisdiction of which relevant agreements are not binding.²⁴⁷

The second view suggested that a procedure would have needed to be included in the ‘DPR’ that would have looked at pre-dispute arbitration agreements that are binding and which would not impose awards from such agreements on online buyers who are not allowed to enter into such agreements in terms of the law of their legal jurisdiction.²⁴⁸

3. THE EVOLUTION OF EU LEGISLATION ON CONSUMER DISPUTES AND ONLINE ARBITRATION

3.1. The EU Regulatory Framework on OADR

The ‘EU ADR Directive on Consumer Disputes of 2013’ and the ‘EU Regulation on Consumer OADR of 2013’ came into effect on 28 July 2013.²⁴⁹

²⁴⁵ WG.III ‘*Report of 26th Session (A/CN.9/762)*’ *op cit* par.15.

²⁴⁶ Beynekhlef, Vermeys ‘*UNCITRAL DPR*’ *op cit* s.p.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ EU Law and Publications ‘*Official Journal of the EU, L165: 18 June 2013*’, 1 at

<<http://publications.europa.eu/en/publication-detail/-/publication/84bfc898-d7e5-11e2-bfa7->

According thereto, EU member states had to implement the 'ADR Directive on Consumer Disputes' within two years; and the 'EU Regulation on Consumer OADR' had to become operational six months later.²⁵⁰ By July 2015 all EU member states complied with the 'ADR Directive', which requires EU member states to enforce certain minimum legal standards when disputes between merchants and buyers are resolved by means of ADR.²⁵¹ The 'Regulation on OADR' mandated the European Commission to establish an EU ODR Platform to serve as a single point of entry to resolve cross-border online buyer disputes.²⁵² The ODR Platform has been operational since 15 February 2016 and is used by nationally approved ADR service providers.²⁵³

The 'ADR Directive', article 5 requires EU member states to ensure ADR service providers are available to resolve national and cross-border disputes between online buyers and online merchants.²⁵⁴ The 'ADR Directive', article 5, article 13 obliges merchants to inform buyers of the ADR service providers that are proficient to deal with given disputes –in addition hereto, online merchants must also inform online buyers when they may voluntarily adhere to ADR/OADR, and when they are legally compelled to do so.²⁵⁵ Online merchants are in other words legally required to inform online buyers of ADR service providers, even if they don't intend to take part in ADR.²⁵⁶

EU member states are required to monitor online merchants' compliance with these information obligations, but also the functioning of ADR service providers in this regard and to then report back on their performance.²⁵⁷ EU member states may issue a fine to online merchants and ADR service providers who do not adhere to the information requirements.²⁵⁸ According to the 'EU ADR Directive', article 6 to article 11, all ADR service providers that want to be

01aa75ed71a1/language-en>, accessed 18 October 2016; EU 'ADR Directive (2013) (2013/11/EU)' *op cit* s.p.; EU Commission 'Regulation on OADR (2013)' *op cit* s.p.; Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 13; European Parliament 'Legal Instruments and Practice of Arbitration in the EU', 214-218 at

<[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU\(2015\)509988_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf)>, accessed 5 October 2016.

²⁵⁰ EU Law and Publications 'Official Journal of the EU, L165: 18 June 2013', 1 at

<<http://publications.europa.eu/en/publication-detail/-/publication/84bfc898-d7e5-11e2-bfa7-01aa75ed71a1/language-en>>, accessed 18 October 2016; EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* s.p.; EU Commission 'Regulation on OADR (2013)' *op cit* s.p.; Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 13.

²⁵¹ EU Commission 'Directive on Consumer Rights of (2011) (2011/83/EC)' at <http://ec.europa.eu/consumers/consumer_rights/rights-agreements/directive/index_en.htm>, accessed 5 November 2016.

²⁵² Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 13.

²⁵³ *Ibid.*

²⁵⁴ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* article 5.

²⁵⁵ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* article 13.

²⁵⁶ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 14.

²⁵⁷ *Ibid.*

²⁵⁸ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 14.

accredited and linked to the ODR Platform must abide with six procedural principles:²⁵⁹ article 6 requires expertise, impartiality and independence;²⁶⁰ article 7 requires transparency;²⁶¹ article 8 requires effectiveness;²⁶² article 9 requires fairness;²⁶³ article 10 requires liberty;²⁶⁴ article 11 requires legality.²⁶⁵ In the event that conflict of laws does occur, the 'ADR Directive', article 11 refers to the 'EU Rome I Regulation', article 6, which states that the applicable law will be the law of the consumer's legal jurisdiction in the event that the merchant targeted, by means of marketing, the buyer in his home market.²⁶⁶

3.1.1. The 'EU ADR Directive on Consumer Disputes of 2013'

The 'ADR Directive' affords consumers the right to use ADR whenever disputes of a contractual nature with merchants need to be resolved.²⁶⁷ It ensures access to ADR, irrespective of the nature of the goods or services that has been procured, or whether it has been procured online or offline or whether the merchant is situated or incorporated in the consumer's member state, and excludes health and higher education disputes.²⁶⁸

3.1.2. The 'EU Regulation on Consumer OADR of 2013'

The European Commission developed the ODRPlatform to serve as an online platform that hosts the resolution of e-commerce disputes between online buyers who are residents of the EU and online merchants who are incorporated in the EU.²⁶⁹ Its purpose is to help online buyers and online merchants resolve their disputes of a contractual nature on goods and services that has been

²⁵⁹ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 14.

²⁶⁰ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* article 6; Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 15.

²⁶¹ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* article 7.

²⁶² EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* article 8.

²⁶³ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* article 9.

²⁶⁴ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* article 10.

²⁶⁵ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* article 11.

²⁶⁶ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* article 11; EU Parliament and Council 'Regulation on the Law Applicable to Contractual Obligations (Rome I) (2008) (593/2008)OJL 177', article 6 at <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593>>, accessed 20 October 2016.

²⁶⁷ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* s.p.; EU 'Alternative and ODR (ADR/ODR)', s.p. at <http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm>, accessed 5 November 2016.

²⁶⁸ EU Commission 'Alternative and ODR (ADR/ODR)' *op cit* s.p.

²⁶⁹ EU Commission 'Regulation on Consumer OADR (2013)' *op cit* article 7; Avvocatti 'Regulation (EU) No. 524/2013', s.p. at <<http://www.lexology.com/library/detail.aspx?g=6e598826-7648-48a4-8bc0-37b9c8f38838>>, accessed 5 November 2016.

procured online, out-of-court in an affordable, easy and fast manner.²⁷⁰ It enables online buyers to submit their disputes online in any of the 23 official languages of the EU.²⁷¹ The ODRPlatform transmits the disputes only to the service providers which has been evaluated by the respective ECC in a given state that has jurisdiction over a dispute and which has been found to adhere to the EU principles and standards on ADR.²⁷² In this regard, each of the EU member states had to establish a national contact point, usually their ECC, to assist users with the ODR Platform.²⁷³

The 'Regulation on OADR', article 14 sets out requirements on information that all online merchants that are situated or incorporated in the EU need to follow.²⁷⁴ online merchants must provide links on their websites to the ODR Platform.²⁷⁵ An online merchant's website should contain its e-mail address, so that online buyers can contact them directly.²⁷⁶ Online buyers should be informed about the existence of the ODR Platform and how to use it.²⁷⁷ Lastly, information on the general terms and conditions applicable to a given online sales or service agreement shall also be given.²⁷⁸ Violating these obligations entails penalties, as determined by each EU member state.²⁷⁹

3.2. Comparison of the EU Approach to OADR to the UNCITRAL Approach to OADR

It is important to discern between the EU initiatives and the 'Technical Notes:' the EU initiatives provide minimum legal standards for all types of OADR models and creates an ODR Platform, while the 'Technical Notes' is targeted at promoting the use of OADR to resolve e-commerce disputes.²⁸⁰

The 'Technical Notes' is applicable subject to the contractual agreement of the parties that it will apply, and even then only to the extent that the 'Technical Notes' are enforceable under the relevant national law.²⁸¹ The 'Technical Notes' cannot overrule national consumer protection law and

²⁷⁰ Avvocatti 'Regulation (EU) No. 524/2013' *op cit s.p.*

²⁷¹ EU Commission 'Alternative and ODR (ADR/ODR)' *op cit s.p.*

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ EU Commission 'Regulation on Consumer OADR (2013)' *op cit* article 14.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ Avvocatti 'Regulation (EU) No. 524/2013' *op cit s.p.*

²⁸⁰ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 17.

²⁸¹ *Ibid.*

legislation.²⁸² As a result, the 'Technical Notes' will have to be incorporated into the main transaction agreement by means of a 'model contractual provision'.²⁸³

The 'Technical Notes' establishes a fast-track OADR process in phases to resolve low-value e-commerce disputes.²⁸⁴ Parties will be able to agree to resolve their dispute in terms of the 'Technical Notes' either when they enter into the e-commerce transaction or once the e-commerce dispute transpires.²⁸⁵ The 'Technical Notes' consequently allows parties to make a contractual agreement that their dispute will be resolved in terms of a three-phased process that will begin with automated negotiation, then escalates to facilitated settlement, and then either concludes in online arbitration (Track I) or non-binding adjudication in the event that the parties decide on following the second track (Track II).²⁸⁶

One of the objectives of both the EU new legislation and the 'Technical Notes on ODR' is to encourage cross-border e-commerce, by acting as *stimuli* to enhance confidence in e-commerce so that parties can know that should a dispute occur, regulatory tools will help to resolve it affordably, efficiently and expeditiously.²⁸⁷ Although the 'DPR' envisioned an accreditation system, just like the EU system, the EU system takes OADR a step further in this regard, by requiring EU member states to ensure that the ADR/OADR service providers in each states' legal jurisdiction comply with the procedural guarantees that are set out in the 'ADR Directive'.²⁸⁸ While the 'Technical Notes' sets out a three-phase procedure that moves from the Negotiation Phase to Facilitated Settlement, and then either concludes in a Final Stage in either the 'DPR' 'Track I' proposal, namely online arbitration, or its 'Track II' proposal, namely non-binding adjudication, the 'Regulation on OADR' extends to various different ADR/OADR *extra-judicial* processes.²⁸⁹ In this regard, the EU approach accommodates the models and traditions of consumer redress currently found in the various legal jurisdictions of the EU, such as complaints boards, ombudsmen *etc.*, and let the individual ADR/OADR service providers establish the specific procedures themselves.²⁹⁰

²⁸² WG.III 'DPR of the 25th Session (A/CN.9/739)' *op cit* par.16.

²⁸³ Cortés, De la Rosa 'Building a Global Redress System for Low-Value Cross-Border Disputes' *International and Comparative Law Quarterly* 2 (2013) 411.

²⁸⁴ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 17.

²⁸⁵ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 412.

²⁸⁶ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 17.

²⁸⁷ Hodges *et al.* 'Consumer ADR in Europe (Civil Justice Systems)' *op cit* 45.

²⁸⁸ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 18.

²⁸⁹ EU Commission 'Regulation on Consumer OADR (2013)' *op cit s.p.*; Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 18.

²⁹⁰ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 18.

4. THE MAIN CHALLENGES THAT PREVENTED UNCITRAL'S APPROVAL OF THE DPR

The two main challenges that prevented WG.III's 'DPR' were firstly, the matter of the inclusion of pre-dispute arbitration agreements in consumer agreements; and secondly, the need to ensure that mandatory consumer law, which has a rank of public policy in the EU, is both accommodated and respected.²⁹¹

4.1. Pre-Dispute Arbitration Agreements

The most important reason was the policy differences between legal jurisdictions which permit pre-dispute arbitration agreements, such as the USA and legal jurisdictions which does not acknowledge or allow it, most notably the EU.²⁹²

A stumbling block for WG.III was for a long time the 'EU Directive on ADR's, Preamble, article 43 which constitutes a full ban on pre-dispute arbitration agreements by stating that an agreement between an online buyer and an online merchant to submit complaints to an ADR body should not be binding on the online buyer if it was concluded before the dispute had arisen and if it will divest the online buyer of his/her right to institute an action before a court to resolve the dispute.²⁹³

4.2. High Level of Consumer Protection in the EU which is Guaranteed both in EU Legislation and the National Law of EU Member States

The EU took one of the first steps worldwide to regulate OADR when it adopted the 'Directive on Consumer Disputes' and the 'Regulation on OADR'.²⁹⁴

The EU's ultimate objective for adopting and publishing these instruments is to augment confidence in the EU Single Market and to assist the augmentation of e-commerce in the EU.²⁹⁵ Along with the ADR and OADR instruments, the degree of consumer protection in the EU is very high, because consumer protection is guaranteed both in EU legislation and the different national laws of the EU member states.²⁹⁶

²⁹¹ Cortés, Lodder 'Consumer Dispute Resolution Goes Online' *op cit* 18.

²⁹² WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.30.

²⁹³ EU Commission 'ADR Directive on Consumer Disputes (2013) (2013/11/EU)' *op cit* Preamble section 43.

²⁹⁴ EU Commission 'ADR Directive on Consumer Disputes (2013) (2013/11/EU)' *op cit* article 13; EU Commission 'Regulation on Consumer OADR (2013)' *op cit* article 14.

²⁹⁵ Koulu *op cit* s.p.

²⁹⁶ *Ibid.*

4.3. The Distribution of Arbitration Costs

WG.III could not reach consensus with regards to the distribution of arbitration costs, and more specifically the financial burden associated with the online arbitration proceeding and who should be liable to carry or finance these costs and expenses.²⁹⁷ This issue was pertinent as low-value goods would involve relatively small sums of money which would have had to be set-off against the expenditures.²⁹⁸ Placing the entire financial burden on the online merchants would have led to a conflict of interests.²⁹⁹

4.4. Critique on the Failure of the Proposed 'Two-Track' Solution

The proposed 'Two-Track' system which was introduced at WG.III's 26th Session,³⁰⁰ resolved the dilemma surrounding binding pre-dispute arbitration agreements by separating binding and non-binding OADR rules into two different tracks.³⁰¹ According thereto, the track which made provision for arbitration that is binding would have been applied to both B2C and B2B disputes in legal jurisdictions whose law acknowledges binding pre-dispute arbitration.³⁰² In other words, in order to follow 'Track I', the parties would have had to already agree at the time of purchase that any dispute that may result would be resolved by means of binding arbitration.³⁰³ In order to follow 'Track I', the so-called 'one-click track', only one click of the mouse would have been required, which would have simultaneously completed the online purchase and then also agreed to the binding arbitration provision.³⁰⁴ In order to follow 'Track II', the so-called 'second-click track', another click of the mouse would have been required in addition to the first click that merely completed the online purchase. The second click would have indicated consent to take part in OADR once the dispute has arisen. So in other words, with 'Track II', binding arbitration would still have been possible, but only if the online buyer accepted to partake in online arbitration after the dispute had arisen.³⁰⁵

In summary, both 'Track I' and 'Track II' would have commenced with the Negotiation Phase, but the difference would have been that an online buyer who is a subject of a legal jurisdiction which does not acknowledge binding pre-

²⁹⁷ Souissi 'ODR in International Electronic Operations', s.p. at http://www.cyberjustice.ca/files/sites/102/WP005_DocumentStrategiqueCNUDCI20130304_en.pdf, accessed 5 November 2016.

²⁹⁸ WG.III 'Report of 22nd Session (A/CN.9/716)' op cit par.42.

²⁹⁹ WG.III 'Report of 22nd Session (A/CN.9/716)' op cit par.110.

³⁰⁰ WG.III 'Report of 26th Session (A/CN.9/762)' op cit par.15.

³⁰¹ WG.III 'Report of 26th Session (A/CN.9/762)' op cit par.13-par.24.

³⁰² *Ibid.*

³⁰³ *Ibid.*

³⁰⁴ WG.III 'Report of 26th Session (A/CN.9/762)' op cit par.13-par.24.

³⁰⁵ *Ibid.*

dispute arbitration agreements, would have been required to make a second click in order to be diverted to 'Track II'. The purpose of the second click would have been to opt-in to binding arbitration after the parties have failed to resolve their dispute during the Negotiation Phase.³⁰⁶

The proposed 'Two-Track' system had its own challenges, most notably the complexity of determining which track a dispute would have belonged to and how to determine whether a given B2C dispute would have to be resolved in terms of the law of a legal jurisdiction which acknowledges binding pre-dispute arbitration agreements or in terms of the law of a legal jurisdiction which does not acknowledge binding pre-dispute arbitration agreements.³⁰⁷

Another challenge was the 'Annex question' and who would have had to update it?³⁰⁸

5. IDENTIFYING A SINGLE RECOMMENDATION: PROPOSAL BY THE EU OBSERVER DELEGATION TO WG.III TO FOLLOW THE TWO-TRACK SOLUTION

5.1. Proposal by the EU Observer Delegation

During WG.III's 27th Session the EU observer delegation submitted to the Secretariat a text containing a proposal on the way ahead, and which specifically recommended the delegations of WG.III to stick with the proposed 'Two-Track' solution.³⁰⁹

The proposal firstly looked at the design of the 'DPR'.³¹⁰ WG.III's negotiations on a potential arbitration model were also contentious because basing the 'DPR' on an arbitration model only would not reflect the all OADR models and processes used worldwide.³¹¹ Many successful OADR models and processes of today are not based on pure arbitration and incorporate private enforcement mechanisms.³¹² In addition, arbitration tends to be procedurally intricate when it comes to resolving relatively simple disputes, while many of the more simple disputes could be easily resolved by means of

³⁰⁶ Koulu 'One Click Too Much? Part 1', s.p. at <<http://www.cyberjustice.ca/actualites/2015/03/03/one-click-too-much-thoughts-on-uncitrals-work-on-odr-draft-rules-part-i/>>, accessed 5 November 2016.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ WG.III 'Proposal by EU Observer Delegation (27th Session NY, 20-24 May 2013 A/CN.9/WG.III/WP.121)', section I at <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V13/836/39/PDF/V1383639.pdf?OpenElement>>, accessed 5 November 2016.

³¹⁰ WG.III 'Proposal by EU Observer Delegation (A/CN.9/WG.III/WP.121)' *op cit* section II(A).

³¹¹ Rogers 'Managing Disputes in the Global Market Place' 19(3) *Dispute Resolution Magazine*, s.p. at <http://www.americanbar.org/publications/dispute_resolution_magazine/2013/spring/managing-disputes-in-the-online-global-marketplace.html>, accessed 5 November 2016.

³¹² Rogers 'Managing Disputes in the Global Market Place' *op cit* s.p.

automated negotiation.³¹³ It is also important to bear in mind that when the award creditor or claimant was awarded an arbitration decision it does not mean that s/he can automatically enforce that award against the other party.³¹⁴ Often, when the award creditor or claimant needs to enforce an arbitration award, s/he needs to go to the local court in the legal jurisdiction where the award debtor or respondent lives, or is situated or is incorporated or has assets and request that the award be declared enforceable.³¹⁵

The proposal secondly requested that divergent standards concerning pre-dispute arbitration agreements in 'Track I' and 'Track II' states should be respected in the 'arbitration track'.³¹⁶ This section also looked at why the 'DPR' version compiled during WG.III's 27th Session, and its Addendum document, does not fully implement the outcome of WG.III's 26th Session. It also looked at why saying that the 'DPR' is only contractual in nature was not enough.³¹⁷ The inclusion of an arbitration track in the 'DPR', as well as the acknowledgement of pre-dispute consumer arbitration agreements by the 'DPR', was important for the 'Group I States'. Consequently, the delegations of the 'Group II States' at WG.III's 26th Session, stated that the 'DPR' could not be designed on the model of the standards of one group of states alone if it wished to constitute a global standard for OADR, and as such the following compromise was reached:³¹⁸ firstly, the 'DPR' should adopt a 'Two-Track' approach.³¹⁹ The 'Two-Track approach' should make provision for the so-called 'arbitration track', that leads to arbitration, as well as the so-called 'non-arbitration' track, that does not lead to arbitration.³²⁰ Secondly, in the arbitration track, the 'DPR' would have needed to represent the different standards in 'Group I' states and 'Group II' states that pertains to pre-dispute arbitration agreements.³²¹ In reality this entails that the arbitration track could be designed on the assumption of binding pre-dispute arbitration agreements whenever the transaction involved an online buyer from a 'Group I' state.³²² Every time an online buyer from a 'Group II' state was involved in the transaction, it would have had to adhere to the relevant standard of the 'Group II' states.³²³

³¹³ Rogers 'Managing Disputes in the Global Market Place' *op cit s.p.*

³¹⁴ WG.III 'Issues for Consideration in the Conception of a Global ODR Framework 24th Session (Vienna, 14 – 18 November 2011 A/CN.9/WG.110)', par.1-par.3 at <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V11/859/64/PDF/V1185964.pdf?OpenElement>>, accessed 5 November 2016; Rogers 'Managing Disputes in the Global Market Place' *op cit s.p.*

³¹⁵ *Ibid.*

³¹⁶ WG.III 'Proposal by EU Observer Delegation (A/CN.9/WG.III/WP.121)' *op cit* section II(B).

³¹⁷ *Ibid.*

³¹⁸ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.13-par.24.

³¹⁹ *Ibid.*

³²⁰ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.13-par.24.

³²¹ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.18-par.19; par.22.

³²² *Ibid.*

³²³ *Ibid.*

The proposal thirdly said that the challenge was ensuring that the online buyers were diverted to the right track.³²⁴

6. UNCITRALS' ACCEPTANCE OF THE 'UNCITRAL TECHNICAL NOTES ON OADR OF 2016'

6. 1. Introduction

After seven years of negotiations, the delegations to WG.III were unable to reach an agreement on the 'DPR' where an OADR procedure would conclude with a Final Phase that would comprise online arbitration.³²⁵

At UNCITRAL's 48th Session, UNCITRAL instructed WG.III to continue compiling a non-binding descriptive document that reflects elements of an OADR process, on which elements it had previously reached consensus, excluding the question of the nature of the final phase of the OADR process (arbitration/non-arbitration).³²⁶ It was also agreed that WG.III would be given a time limit of one year or no more than two Working Group sessions, after which the work of WG.III would come to an end, irrespective of whether or not a result had been achieved.³²⁷ As a result, WG.III agreed to conclude the deliberations and issue the 'Technical Notes' in the place of what would have been the 'DPR'.³²⁸ The 'Technical Notes' is based on the elements on which WG.III had previously reached consensus on.³²⁹ The envisaged procedure begins with a Negotiation Phase between the parties, and when the parties are unable to reach an agreement, the dispute gets escalated to a neutral third party who acts as a conciliator or facilitator when both parties so agree; if the parties refuses to agree to the recommendation, the dispute should be adjudicated through binding online arbitration, similar to 'Track I' in the 'DPR' or a non-binding recommendation, similar to 'Track II' in the 'DPR'.³³⁰

UNCITRAL adopted the final version of the 'Technical Notes' on 5 July 2016 at its 49th Session.³³¹

³²⁴ WG.III 'Proposal by EU Observer Delegation (A/CN.9/WG.III/WP.121)' *op cit* section II(C).

³²⁵ Cortés 'The New Regulatory Framework for Consumer ADR' University of Leicester School of Law Research Paper No.16/28, 73 at <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2793564>, accessed 2 December 2016.

³²⁶ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* par.352.

³²⁷ *Ibid.*

³²⁸ WG.III 'Report of 33rd Session (A/CN.9/868)', section IV.

³²⁹ Cortés *The New Regulatory Framework for Consumer ADR* 73.

³³⁰ *Ibid.*

³³¹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section V.

6.2. Overview of the Different Sections

The 'Technical Notes' comprise twelve sections, which on their turn comprise of 53 articles.³³² Below is a layout of each section with comments where necessary.

6.2.1. Section I: 'Introduction'

Section I: 'Introduction', articles 1 to article 9 gives an overview of OADR and describe the purpose and non-binding character of the 'Technical Notes'.³³³

6.2.1.1. Section I s.v. 'Overview of ODR'

Article 1 states that there is a need for a mechanism to resolve disputes from cross-border e-commerce transactions.³³⁴

Article 2 states that OADR is one such mechanism and that it includes, but not limited to ombudsmen, complaints boards, negotiation, conciliation, mediation, facilitated settlement, arbitration, *etc.*, as well as hybrid processes that comprise both online and offline elements.³³⁵

6.2.1.2. Section I s.v. 'Purpose of the Technical Notes'

Article 3 states that the purpose of the 'Technical Notes' is to assist OADR administrators, ODR platforms, neutrals third parties, and the parties who are part of an OADR proceeding.³³⁶

Article 4 states that the 'Technical Notes' embody the principles of accountability, due process, effectiveness, efficiency, fairness, impartiality, independence and transparency.³³⁷ No mention was made of confidentiality.³³⁸

Article 5 states that the 'Technical Notes' are intended for use in disputes that arise from cross-border, low-value sales or service agreements concluded by means of online communications.³³⁹

Article 5 made no mention of disputes that arise from high-volume e-commerce transactions and also did not differentiate between disputes from B2C and B2B e-commerce transactions.

³³² UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A.

³³³ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section I.

³³⁴ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section I, article 1.

³³⁵ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section I, article 2.

³³⁶ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section I, article 3.

³³⁷ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section I, article 4.

³³⁸ WG.III 'Report of 33rd Session (A/CN.9/868)' *op cit* par.19-par.21.

³³⁹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section I, article 5.

6.2.1.3. Section I s.v. 'Non-Binding Character of the Technical Notes'

Article 6 states that the 'Technical Notes' is non-binding in character and that it is a descriptive document that is not supposed to be interpreted as being exclusive or exhaustive in nature.³⁴⁰ It also states that it does not impose any legal requirement that binds parties, OADR service providers or neutral third parties, and do not imply any modification to any other OADR rules that the parties may have selected to resolve their dispute.³⁴¹

Article 6 made no mention that the 'Technical Notes' do not supplant or override applicable law.³⁴²

6.2.2. Section II: 'Principles'

Section II: 'Principles', article 7 to article 17 sets out the values that an OADR service provider should strive towards such as transparency, independence, expertise and consent.³⁴³

Article 7 states that the principles that underpin any OADR process include fairness, transparency, due process and accountability.³⁴⁴ It does not set out how the principles of accountability, fairness or due process that it mentions should be interpreted and makes no mention of confidentiality, nor of security.³⁴⁵

Article 9 states that OADR is supposed to be efficient, fast and simple and that it should not impose burdens, delays and expenses that are disproportionate to the value of the dispute.³⁴⁶

6.2.2.1. Section II s.v. 'Transparency'

Article 10 states that it is desirable to disclose any relationship between the OADR service provider and a particular online merchant, so that parties could be informed on any potential conflicts of interest.³⁴⁷

Article 11 states that the OADR service provider may wish to publish anonymised data or statistics on outcomes of OADR processes, in order to enable parties to evaluate its overall record, consistent with applicable principles of confidentiality.³⁴⁸

³⁴⁰ UNCITRAL 'Report of 49th Session (A/70/17)' op cit Annexure A, section I, article 6.

³⁴¹ *Ibid.*

³⁴² WG.III 'Draft Outcome Document Reflecting Elements and Principles of an ODR Process (33rd Session NY 29 February-3 March February 2016 A/CN.9/WG.III/WP.140)', section I, p.6 at http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.htm, accessed 15 August 2016.

³⁴³ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 7-article 17.

³⁴⁴ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 7.

³⁴⁵ WG.III 'Report of 33rd Session (A/CN.9/868)' op cit par.19; par.20.

³⁴⁶ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 9.

³⁴⁷ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 10.

³⁴⁸ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 11.

Article 12 states that all relevant information should be available on the OADR service provider's website in a user-friendly and accessible manner.³⁴⁹

6.2.2.2. Section II s.v. 'Independence'

Article 13 advises service providers to adopt a code of ethics for its neutral third parties, in order to guide the said neutral third parties as to conflicts of interest and other rules of conduct.³⁵⁰

Article 14 advises service providers to adopt policies that identify and handle conflicts of interest.³⁵¹

6.2.2.3. Section II s.v. 'Expertise'

Article 15 advises the service providers to implement comprehensive policies that regulate the selection and training of neutral third parties.³⁵²

Article 16 advises service providers that an internal oversight or quality assurance process may help them to ensure that neutral third parties conform to the standards that the service provider has set for itself.³⁵³

6.2.2.4. Section II s.v. 'Consent'

Article 17 determines that the OADR process should be based on the explicit and informed consent of the parties.³⁵⁴

6.2.3. Section III: 'Phases of an ODR Process'

Article 18 sets out that an OADR proceeding may consist of a Negotiation Phase; a Facilitated Settlement Phase; and a third and Final Phase.³⁵⁵

Article 19 describes that when a claimant submits a notice through the ODR Platform to the OADR service provider, according to Section VI: 'Commencement of ODR Proceeding', the OADR service provider should inform the respondent of the claim and the claimant of the response.³⁵⁶ The Negotiation Phase will then begin, and the parties should then negotiate directly via the ODR Platform by means of IT.³⁵⁷

³⁴⁹ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 12.

³⁵⁰ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 13.

³⁵¹ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 14.

³⁵² UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 15.

³⁵³ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 16.

³⁵⁴ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section II, article 17.

³⁵⁵ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section III, article 18.

³⁵⁶ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section III, article 19; Section IV.

³⁵⁷ *Ibid.*

Article 20 determines that in the event that the Negotiation Phase fails, the process may move to the Facilitated Settlement Phase, in terms of article 40 to article 44.³⁵⁸ The OADR service provider should appoint a neutral third party, in terms of article 25 below, to administer the Facilitated Settlement Phase, and s/he should communicate with the parties in an attempt to reach a settlement.³⁵⁹

According to article 21, in the event that Facilitated Settlement Phase fails, a third and Final Phase may commence, in which case the neutral third party may inform the parties of the nature of such phase.³⁶⁰

6.2.4. Section IV: ‘Scope of ODR Process’

Article 22 states that an OADR process may be particularly useful to help resolve disputes that arise out of cross-border, low-value e-commerce transactions.³⁶¹ In addition it affirms that an OADR process may apply to disputes arising out of both a B2C as well as B2B transactions.³⁶²

Article 23 in addition states that an OADR process may apply to disputes arising out of both sales and service agreements.³⁶³

6.2.5. Section V: ‘ODR Definitions, Roles and Responsibilities, and Communications’

Article 24 states that OADR is a mechanism to resolve disputes through the use of online communications and other information and communication technology.³⁶⁴ It acknowledges that the process may be implemented differently by different service providers, and that it may evolve over time.³⁶⁵

This provision in essence leaves room for future IT and software application developments.

Article 26 determines that OADR requires a technology-based intermediary.³⁶⁶ In other words, unlike offline ADR, an OADR proceeding cannot be conducted on an *ad hoc* basis involving only the parties to a dispute and a neutral third party, without the OADR service provider.³⁶⁷ Instead, to permit the use of technology to enable a dispute resolution process, an OADR process requires an online platform for generating, sending, receiving, storing,

³⁵⁸ UNCITRAL ‘Report of 49th Session (A/70/17)’ *op cit* section III, article 20; article 40-article 44.

³⁵⁹ UNCITRAL ‘Report of 49th Session (A/70/17)’ *op cit* section III, article 20; article 25.

³⁶⁰ UNCITRAL ‘Report of 49th Session (A/70/17)’ *op cit* section III, article 21.

³⁶¹ UNCITRAL ‘Report of 49th Session (A/70/17)’ *op cit* section IV, article 22.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ UNCITRAL ‘Report of 49th Session (A/70/17)’ *op cit* section V, article 24.

³⁶⁵ *Ibid.*

³⁶⁶ UNCITRAL ‘Report of 49th Session (A/70/17)’ *op cit* section V, article 26.

³⁶⁷ *Ibid.*

exchanging or otherwise processing online communications in a manner that ensures data security.³⁶⁸

Article 27 determines that an ODR Platform should be administered and coordinated by an OADR service provider.³⁶⁹ In addition it states that the OADR service provider may be separate from, or part of, the ODR Platform.³⁷⁰

Article 28 advises that in order to enable communications during the OADR proceeding, it is desirable that both the OADR service provider and the ODR Platform be specified in the dispute resolution provision.³⁷¹

Article 29 determines that online communications include any communication (including a statement, declaration, demand, notice, response, submission, notification or request) made by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means.³⁷²

Article 30 advises that it is desirable that all communications in OADR proceedings take place via the ODR Platform.³⁷³ Consequently, both the parties to the dispute, and the ODR Platform itself, should have a designated online address.³⁷⁴

Article 31 advises that in an attempt to enhance efficiency it is desirable that the OADR service provider promptly: (a) acknowledge receipt of any communication by the ODR Platform; (b) notify parties of the availability of any communication received by the ODR Platform; and (c) keep the parties informed of the commencement and conclusion of different phases of the proceedings.³⁷⁵

Article 32 further advises that in order to avoid loss of time, it is desirable that a communication be deemed to be received by a party when the OADR service provider notifies that party of its availability on the Platform.³⁷⁶

6.2.6. Section VI: 'Commencement of ODR Proceedings'

Article 33 states that in order for an OADR proceeding to begin, it is desirable that the claimant provide the OADR service provider with a notice that contains the following information: (a) the name and online address of the claimant and that of his/her representative if s/he has one; (b) the name and online address of the respondent and that of his/her representative if s/he has one; (c) the grounds of the claim; (d) any proposed solutions; (e) the claimant's

³⁶⁸ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section V, article 26.

³⁶⁹ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section V, article 27.

³⁷⁰ *Ibid.*

³⁷¹ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section V, article 28.

³⁷² UNCITRAL 'Report of 49th Session (A/70/17)' op cit section V, article 29.

³⁷³ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section V, article 30.

³⁷⁴ *Ibid.*

³⁷⁵ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section V, article 31(a)-article 31(c).

³⁷⁶ *Ibid.*

language of choice for the proceeding; and (f) the signature or way in which the claimant/representative may be identified and authenticated.³⁷⁷

Article 34 determines that an OADR proceeding may be seen to begin when the OADR service provider notifies the respondent that the notice of the claimant is available at the ODR Platform.³⁷⁸

Article 35 advises that it is desirable that the respondent replies to the OADR service provider within a reasonable time after s/he is notified of the claimant's notice on the ODR Platform, and that the response includes the respondent's particulars and contact details.³⁷⁹

Article 36 advises that as much as is possible, it is desirable that both the notice and response be accompanied by all documents and other evidence relied upon by each party, or contain references to them.³⁸⁰

6.2.7. Section VII: 'Negotiation'

Article 37 sets out that the first phase may be a Negotiation Phase, conducted between the parties via the ODR Platform.³⁸¹

Article 38 determines that the first phase of proceedings may commence following the communication of the respondent's response to the ODR Platform and: (a) notification thereof to the claimant; or (b) failing a response, the lapse of a reasonable period of time after the notice has been communicated to the respondent.³⁸²

Article 39 advises that it is desirable that, if the negotiation does not result in a settlement within a reasonable period of time, the process proceed to the next phase.³⁸³

6.2.8. Section VIII: 'Facilitated Settlement'

Article 40 sets out that the Second Phase of an OADR proceeding may be facilitated settlement, whereby a neutral third party is appointed and communicates with the parties to try to achieve a settlement.³⁸⁴

Article 41 advises that this phase may commence if the Negotiation Phase via the Platform fails for any reason (including non-participation or failure to reach a settlement within reasonable time), or where one or both parties to the dispute request to move directly to the next phase of proceedings.³⁸⁵

³⁷⁷ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VI, article 33(a)-(f).

³⁷⁸ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VI, article 34.

³⁷⁹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VI, article 35(a)-(e).

³⁸⁰ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VI, article 36.

³⁸¹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VII, article 37.

³⁸² UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VII, article 38(a)-(b).

³⁸³ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VII, article 39.

³⁸⁴ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VIII, article 40.

³⁸⁵ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VIII, article 41.

Article 42 advises that upon commencement of the Facilitated Settlement Phase of the proceeding, it is desirable that the OADR service provider appoints a neutral third party, and notifies the parties of that appointment, and provides certain details about the identity of the neutral third party in accordance with article 46 below.³⁸⁶

Article 43 advises that during the Facilitated Settlement Phase, it is desirable that the neutral third party communicate with the parties to try to achieve a settlement.³⁸⁷

Article 44 determines that if a facilitated settlement cannot be achieved within a reasonable period of time, the process may move to a final phase.³⁸⁸

6.2.9. Section IX: Final Phase

Article 45 advises that if the neutral third party has not succeeded in facilitating the settlement, it is desirable that the OADR service provider or neutral third party informs the parties of the nature of the Final Phase, and of the form that it might take.³⁸⁹

6.2.10. Section X: 'Appointment, Powers and Functions of the Neutral'

Article 46 advises that to enhance efficiency and reduce costs, it is preferable that the OADR service provider appoint a neutral third party only when a neutral third party is required in accordance with any applicable OADR rules.³⁹⁰

Article 47 advises that it is desirable that neutral third parties have the relevant professional experience as well as dispute resolution skills to enable them to deal with the dispute in question.³⁹¹ However, subject to any professional regulation, neutral third parties do not necessarily need be qualified lawyers.³⁹²

Article 48 advises with regard to the appointment and functions of neutral third parties, that it is desirable that: (a) the neutral third party's acceptance of his/her appointment should confirm that s/he has the necessary time; (b) s/he should declare his/her impartiality and independence and disclose at any time any facts or circumstances that might give rise to likely doubts as to his/her impartiality or independence; (c) the OADR system provides parties with a

³⁸⁶ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VIII, article 40; article 46.

³⁸⁷ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VIII, article 43.

³⁸⁸ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section VIII, article 44.

³⁸⁹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section IX, article 41.

³⁹⁰ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section X, article 46.

³⁹¹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section X, article 47.

³⁹² *Ibid.*

method to object to the appointment of a neutral third party; (d) in the event of an objection to an appointment of a neutral third party, the OADR service provider should make a determination how the neutral third party shall be replaced; (e) there is only one neutral third party per dispute appointed at any time for reasons of cost efficiency; (f) a party is entitled to object to the neutral third party receiving information generated during the Negotiation Phase ; and (g) if the neutral third party resigns or has to be replaced, the OADR service provider is required to appoint a replacement.³⁹³

Article 49 advises that in respect of the powers of the neutral third party, it is desirable that: (a) subject to any applicable OADR rules, the neutral third party should conduct the proceedings as s/he considers appropriate; (b) is required to avoid unnecessary delay or expense; (c) is required to provide a fair and efficient process; (d) is required to remain independent, impartial and treat both parties equally; (e) is required to conduct proceedings based on such communications as are before him/her; (f) is enabled to allow the parties to provide additional information; and (g) is enabled to extend any deadlines for a reasonable time.³⁹⁴

Article 50 advises on streamlined appointment and challenge procedures.³⁹⁵

6.2.11. Section XI: ‘Language’

Article 51 acknowledges that technology can offer a great deal of flexibility regarding the language used for the proceeding.³⁹⁶

6.2.12. Section XII: ‘Governance’

Article 52 advises that it is desirable for OADR service providers to have a set of guidelines and/or minimum requirements for themselves and for the conduct of ODR platforms.³⁹⁷

Article 53 advised that that OADR should be subject to the same confidentiality and due process standards that apply to ADR.³⁹⁸

7. CONCLUSION

WG.III had to start developing rules on OADR, which had to complement the already existing EU initiatives.³⁹⁹ The EU legal instruments follow a different

³⁹³ UNCITRAL ‘Report of 49th Session (A/70/17)’ op cit section X, article 48(a)-(g).

³⁹⁴ UNCITRAL ‘Report of 49th Session (A/70/17)’ op cit section X, article 49(a)-(g).

³⁹⁵ UNCITRAL ‘Report of 49th Session (A/70/17)’ op cit section X, article 50.

³⁹⁶ UNCITRAL ‘Report of 49th Session (A/70/17)’ op cit section XI, article 51.

³⁹⁷ UNCITRAL ‘Report of 49th Session (A/70/17)’ op cit section XII, article 52.

³⁹⁸ UNCITRAL ‘Report of 49th Session (A/70/17)’ op cit section XII, article 53.

model to promote the use of OADR for cross-border, low-value, e-commerce disputes than WG.III's 'DPR' likely would have seemed to have followed.⁴⁰⁰ Both the EU legal instruments as well as the 'DPR' attempted to strike the right balance between the requirements for due process, in other words fairness, and economic restraints to resolve low-value e-commerce disputes, in other words efficiency.⁴⁰¹ WG.III was developing a fixed and rigid procedure that could then have been contractually chosen by the parties, and was driven by the concept of efficiency.⁴⁰² In the meantime, the EU has implemented legal instruments that set minimum standards for many OADR procedures used to resolve consumer disputes, and here fairness appears to have been the main consideration.⁴⁰³

From this chapter it can be seen that the 'DPR' and the EU legal instruments were incompatible.⁴⁰⁴ The streamlining of the two models largely depended on WG.III to devise a model that would respect the current EU consumer protection policies.⁴⁰⁵ WG.III therefore had to devise a binding process which needed to respect not only minimum due process requirements, but also mandatory national consumer laws.⁴⁰⁶

This section has also examined the legal and technical challenges in coordinating the 'DPR' which ultimately led to the 'Technical Notes'. It evaluated important matters which WG.III had to look at, most notably the validity of pre-dispute arbitration agreements, the use of incentives, the possibilities for accreditation of OADR service providers and the challenges based on mandatory consumer laws. It is contended that the success of the 'Technical Notes' will depend on the development of a monitoring system for OADR processes. Such a monitoring process should evaluate whether OADR processes comply with minimum standards, whether there are built-in incentives to encourage participation and whether provision is made for an Negotiation Phase which allows parties to settle a dispute amongst themselves at an early stage, whether the power of the 'fourth party', namely IT, is employed and whether outcomes are swiftly enforced outside the courts.⁴⁰⁷

³⁹⁹ Cortés, De La Rosa *'Building a Global Redress System'* op cit 438.

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

⁴⁰⁴ Schultz *'Internet Disputes, Fairness in Arbitration and Transnationalism'* (2010) 73 157-158.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Cortés, De La Rosa *'Building a Global Redress System'* op cit 440.

⁴⁰⁷ *Ibid.*

CHAPTER 7:

ONLINE ARBITRATION IN SA

1. INTRODUCTION

More than 50 years has passed since SA's arbitration legislation was promulgated in 1965 and during this time the SA political, economic and legislative landscape has shifted dramatically.¹ A new arbitration act is desperately needed to bring arbitration in SA up to date with international procedures and standards and to lay the foundation for SA to become Africa's arbitration hub.

In force for almost half a century, the 'SA Arbitration Act 42 of 1965', as amended by the 'SA Justice Laws Rationalisation Act 18 of 1996' and the 'SA General Law Amendment Act 49 of 1996', constitutes the legal framework for arbitration in SA, but needs to be updated so as to be brought on par with international developments.² Anachronistic provisions in the 'SA Arbitration Act' discourages parties from selecting SA as their seat of arbitration, and consequently SA is failing to keep pace with other African countries, like Mauritius, which has established themselves as arbitration hubs, due to proactive policies and measures.³ Despite the defects in the current legislation and the incessant requests to update the legal framework, a new SA Domestic Arbitration Act must still be drafted and the 'International Arbitration Bill' is yet to be approved by the SA Parliament.⁴ The SA legal framework for arbitration was again recently criticised when the 'SA Promotion and Protection of Investment Act 22 of 2015' was approved in SA Parliament, and as such it seems to a good time to re-evaluate the 'SA Arbitration Act'.⁵ An important recent development was when the SA Minister of Justice approved the new 'SA International Arbitration Bill' in 2016, despite it being long overdue; it however still awaits final approval by the SA Parliament.⁶

Although SA is Africa's economic powerhouse with a strong legal system, it has for decades been neglected as a place of arbitration.⁷ This chapter will

¹ Baker 'Overhauling Arbitration in SA', *s.p.* at <<http://www.nortonrosefulbright.com/knowledge/publications/121382/overhauling-arbitration-in-south-africa>>, accessed 5 November 2016.

² SAFLII 'The SA Arbitration Act 42 of 1965', *s.p.* at <http://www.saflii.org/za/legis/hist_act/aa42o1965156/aa42o1965a1a1997244.pdf> accessed 5 November 2016; 'SA Arbitration Act 42 of 1965'; 'SA Justice Law Rationalisation Act 18 of 1996'; 'SA General Law Amendment Act 49 of 1996'.

³ Baker *op cit s.p.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Baker *op cit s.p.*

⁷ Ewers *et al.* 'Why SA Should Update its International Arbitration Legislation' *Journal of International Arbitration* 1.

examine the reasons for this, look at the current situation and also evaluate the best options for the future. This chapter will show that the 'SA Arbitration Act' affords disproportionate discretionary powers to local courts, which allows them to impede an arbitration proceeding,⁸ and that the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977' does not give adequate effect to the 'NY Convention'.⁹ This chapter acknowledges that recent developments to update SA's legal framework are steps in the right direction, but will conclude that even greater legal reform for arbitration, in order to also include online arbitration, is needed in SA.

2. SA'S CURRENT TRADITIONAL ARBITRATION FRAMEWORK

2.1. SA's Current International Commercial Arbitration Legislation

International Commercial Arbitration in SA is currently still regulated by the 'SA Arbitration Act 42 of 1965' and the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'.¹⁰ The latter was promulgated to give effect to the 'NY Convention'.¹¹ By acceding to the 'NY Convention', SA has agreed to enforce commercial arbitration awards that were made in the legal jurisdictions of other contracting states.¹²

Since SA has so quickly grown from a country trapped in economic isolation to one of the most swiftly developing countries in Africa, it can be anticipated that if SA were to update its legislation on international arbitration and online arbitration, it would become a more regular seat of international arbitration and a hub for international arbitration whichever way one looks at it; be it in the Southern Hemisphere, be it in the developing world, be it in Africa or be it in Sub-Saharan Africa.¹³ Despite the need for law reform, a strong impetus has started to develop in recent years to strengthen the central tenets of international arbitration in SA and for the country to take up its place in international commerce as the gateway to Africa, as Harms JA of the

⁸ UNCITRAL 'NY Convention (1958)' *op cit s.p.*; 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'.

⁹ SA Law Commission (SALC) 'Project 94: An International Arbitration Act for SA: Report of 1998', par.1.1. at <http://www.justice.gov.za/salrc/reports/r_prj94_july1998.pdf>, accessed 21 October 2016.

¹⁰ Baker *op cit s.p.*

¹¹ UNCITRAL 'NY Convention (1958)' *op cit s.p.*; 'SA Arbitration Act 42 of 1965'; 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'.

¹² UNCITRAL 'NY Convention (1958)' *op cit s.p.*

¹³ Bohlmann *et al.* 'Predicting the Economic Impact of the 2010 FIFA World Cup on SA' *International Sport Management and Marketing* 3(4) 2008 383.

SASupreme Court of Appeal (SCA) acknowledged in *Telecordia Technologies Inc v Telkom SA Ltd*.¹⁴

2.2. SA's Current Arbitration Legislation is Unfavourable to International Commercial Arbitration

The 'SA Arbitration Act' allows too much judicial intervention throughout a proceeding, ranging from before a proceeding begins, to before the appointment of the arbitrator, during the arbitration proceeding and after the arbitration award is issued.¹⁵ For instance, article 12 allows a party to apply to the court to appoint an arbitrator in the event that a selection process fails for whatever reason.¹⁶ Article 13(2)(a) allows a party to apply at any time to the court and permits the court to, on good cause shown, set aside an arbitrator's appointment or remove the arbitrator from office.¹⁷ Article 21 affords the court the power to make orders in respect of any matters related to (a) security for costs; (b) discovery of documents and interrogatories; (c) the examination of any witness; (d) the giving of evidence by affidavit; (e) the inspection or the interim custody or the preservation or the sale of goods or property; (f) an interim interdict or similar relief; (g) securing the amount in dispute in the reference; and (h) substituted service of notices required by this 'Act' or of summonses.¹⁸

In addition, according to article 20, an arbitrator may, when a party so requests or out of his/her own, refer any legal questions that have bearing on the proceeding for the opinion of a court or for the opinion of counsel, as long as it is before s/he makes a final award and either on the application of any party or if the parties so agree.¹⁹ The opinion of the court or counsel is final and may not be appealed, and is therefore binding on the arbitration proceeding.²⁰ The unfortunate sum total of all of these provisions of the 'SA Arbitration Act' is that it allows parties to gravely misuse local courts as a delaying tactic.²¹

Most national and international arbitration laws allow a defendant in court to ask for referral of a dispute to arbitration when s/he relies on an existing valid arbitration agreement.²² The 'NY Convention', article II(3) states that a court must then stay its proceedings when it receives a request to have a dispute

¹⁴ *Telecordia Technologies Inc. v Telkom SA Ltd* (26/05) (2006) ZASCA 112; (2006) 139 SCA (RSA); 2007(3) SA 266 (SCA); (2007) 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) (22 November 2006); Burrow 'Case Note, *Telecordia Technologies Inc. v Telkom SA Ltd*' *Arbitration International* 24(2008) 337.

¹⁵ Butler, Finsen *op cit* 123.

¹⁶ 'SA Arbitration Act 42 of 1965', article 12.

¹⁷ 'SA Arbitration Act 42 of 1965', article 13(2)(a).

¹⁸ 'SA Arbitration Act 42 of 1965', article 21 (a) – (h).

¹⁹ 'SA Arbitration Act 42 of 1965', article 20.

²⁰ *Ibid.*

²¹ Butler *et al. op cit* 125.

²² Lew *et al. Comparative International Commercial Arbitration* 339.

resolved by arbitration, unless the arbitration agreement is null and void or inoperative or incapable of being performed.²³ The 'Model Law on ICA', article 8(1), also states that a court shall refer a dispute for arbitration as long as it is done in terms of a valid arbitration agreement.²⁴ However, in terms of the 'SA Arbitration Act', article 6(2), a SA court is under no such obligation.²⁵ In terms of article 6, a SA court has a broad discretion to stay the proceedings and refer a dispute to arbitration when a party so requests even when there is a binding arbitration agreement, unless the court finds that there is sufficient reason against such referral.²⁶ So, in other words, when a party in SA attempts to circumnavigate arbitration by taking the dispute to court, the court may in terms of the 'SA Arbitration Act', article 6 refuse referral of the dispute to arbitration when the party gives sufficient reasons.²⁷

Moreover, in terms of the 'SA Arbitration Act,' article 3(2), a SA court has a discretion as to whether or not it should coerce parties with a valid arbitration agreement to settle for arbitration, as the court may invalidate such an agreement if a party show good cause.²⁸ If a party would want to avoid an arbitration proceeding by, for instance, opposing the stay of court proceedings, it can apply to the court for an order which sets the arbitration agreement aside, irrespective of whether it is valid or not.²⁹ Such a party would just be required to prove good cause for the arbitration agreement to be set aside.³⁰

Likewise, the 'SA Arbitration Act' also does not enforce arbitration awards strictly in accordance with the 'NY Convention', which SA ratified in 1976 and which led to the promulgation of the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act'.³¹ Although this 'Act' is based on the 'NY Convention,' it has more than a few inconsistent provisions.³² The 'SA Recognition and Enforcement of Foreign Arbitral Awards Act' covers for example only the recognition and enforcement of foreign arbitration awards and does not mention the recognition and enforcement of an arbitration agreement, as the 'NY Convention' does.³³ Likewise, the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act', article 2(1), in an attempt to give effect to the 'NY Convention', article III, expresses a possibility by using the permissive word;

²³ UNCITRAL 'NY Convention (1958)' *op cit* article II(3).

²⁴ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit* article 8(1).

²⁵ 'SA Arbitration Act 42 of 1965', article 6(2).

²⁶ 'SA Arbitration Act 42 of 1965', article 6.

²⁷ Ewers *et al.* *op cit* 5.

²⁸ 'SA Arbitration Act 42 of 1965', article 3.

²⁹ Ewers *et al.* *op cit* 6.

³⁰ *Ibid.*

³¹ 'SA Arbitration Act 42 of 1965'; UNCITRAL 'NY Convention (1958)' *op cit s.p.*; 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'; Ewers *et al.* *op cit* 6.

³² UNCITRAL 'NY Convention (1958)' *op cit s.p.*; 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'; Ewers *et al.* *op cit* 6.

³³ *Ibid.*

“may;” which leads to the notion that a SA court has discretion to either recognise a foreign award or not.³⁴

The current SA arbitration legal framework also has other important shortcomings. An obvious impediment is that the ‘SA Arbitration Act’ was enacted in 1965, before the ‘Model Law on ICA’ was introduced and is thus outdated in this regard.³⁵ The ‘Model Law on ICA’ promotes uniformity in international arbitration procedures and attempts to limit interference from the national courts in arbitration.³⁶

What is especially concerning to parties and potential parties is the extent to which the ‘SA Arbitration Act’, article 3 allows the court a discretion to enforce an arbitration agreement.³⁷ Article 3(2), allows the court, where good cause is shown, to (a) set the arbitration agreement aside; or, to (b) order that any particular dispute referred to in the agreement shall not be referred to arbitration.³⁸ Additionally, the (c) court may order that the arbitration shall stop to have effect with reference to any dispute which is referred.³⁹ Furthermore, article 6(2) states that the court may stay proceedings before the court, in instances where there is an agreement, if the court finds that there is no sufficient reason why the dispute should not be referred to arbitration.⁴⁰ Contrariwise, in terms of the ‘NY Convention’, article II(3) a court will in such circumstances refer the parties to arbitration.⁴¹

3. THE DEVELOPMENT OF SA ADR AND ARBITRATION LAW REFORM (BY YEAR)

In July 1998, SALC produced a report on an International Arbitration Act for SA, entitled; ‘Project 94: Arbitration: An International Arbitration Act for SA;’ in which it recommended that SA’s executive branch of government adopts the ‘Model Law on ICA’ to regulate international commercial arbitration.⁴² In May 2001, SALC published a report on domestic arbitration, entitled; ‘Domestic

³⁴ UNCITRAL ‘NY Convention (1958)’ *op cit* article III; ‘SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977’, article 2(1); Ewers *et al.* *op cit* 6.

³⁵ UNCITRAL ‘Model Law on ICA (1985/2006)’ *op cit s.p.*; ‘SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977’.

³⁶ UNCITRAL ‘Model Law on ICA (1985/2006)’ *op cit s.p.*

³⁷ *Ibid.*

³⁸ ‘SA Arbitration Act 42 of 1965’, article 3(2)(a)-(b).

³⁹ ‘SA Arbitration Act 42 of 1965’, article 3(2)(c).

⁴⁰ ‘SA Arbitration Act 42 of 1965’, article 6(2).

⁴¹ UNCITRAL ‘NY Convention (1958)’ *op cit* article II(3).

⁴² SALC ‘Project 94’ *op cit s.p.*; UNCITRAL ‘Model Law on ICA (1985/2006)’ *op cit s.p.*; Baker *op cit s.p.*

Arbitration: An Arbitration Act for SA'.⁴³ Draft bills for both international and national arbitration were also published for consideration.⁴⁴

In spite of the initial progress, further legislative action by the SA Parliament has been slow on arbitration and nearly 20 years has since passed.⁴⁵ As can be expected in a young democracy in the developing world, the debate on reforming arbitration law in SA attracted robust public political comment.⁴⁶ The debate did not benefit when the Judge President of the Western Cape High Court, Hlophe JP, came to a conclusion in a report in 2005, entitled; 'Racism in the Cape Provincial Division,' that arbitration undermines judicial transformation in SA – although his argument was rejected by both the Cape Bar and the Arbitration Foundation of Southern Africa (AFSA) it did irreparable harm to the transformation of arbitration law in SA and in part delayed the transformation process unnecessarily for many years.⁴⁷

3.1. SALC Report 'Project 94: Arbitration: An International Arbitration Act for SA' of 1998

SALC proposed that an effective legal framework should be designed to resolve international trade disputes by up-to-date arbitration.⁴⁸ SALC consequently decided to adopt a holistic approach towards transforming both SA's international and national arbitration legislation.⁴⁹ In drawing up a single statute on international arbitration for SA, SALC advised that attention should be paid to three important points: firstly, SA's response to the 'Model Law on ICA'; secondly, possible changes to the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act', so as to give effect to changes in the 'NY Convention'; and thirdly, SA's proposed accession to the 'Washington Convention'.⁵⁰ No mention was made of including online arbitration in the legislation to be drafted.

⁴³ SALC 'Domestic Arbitration Report: An Arbitration Act for SA (July 1998) (First Report)', s.p. at <http://www.justice.gov.za/salrc/reports/r_prj94_july1998.pdf>, accessed 18 August 2016; SALC 'Domestic Arbitration Report: An Arbitration Act for SA (July 1998) (First Report)' op cit s.p.

⁴⁴ SALC 'Project 94' op cit Annexure E; SALC 'Domestic Arbitration Report: An Arbitration Act for SA (July 1998) (First Report)' op cit s.p.

⁴⁵ Baker op cit s.p.

⁴⁶ Ibid.

⁴⁷ Hlophe J 'Report on Racism in the Cape Provincial Division', s.p. at <<http://www.pmg.org.za/files/docs/JudgeHlopheReport.pdf>>, accessed 21 October 2016; Baker op cit s.p.

⁴⁸ SALC 'Project 94' op cit p.21.

⁴⁹ Ibid.

⁵⁰ UNCITRAL 'NY Convention (1958)' op cit article III; UNCITRAL 'Model Law on ICA (1985/2006)' op cit s.p.; ICSID 'Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1966)' at <<http://www.ius.uio.no/im/icsid.settlement.of.disputes.between.states.and.nationals.of.other.states.convention.washington.1965/>>, accessed 16 June 2016; 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'.

The 'Model Law on ICA' sets a framework within which international commercial arbitration can be performed with a balance between minimum judicial intervention and maximum party autonomy.⁵¹ The 'Model Law's aim is to harmonise and unify national laws on international arbitration procedures.⁵² The idea is that individual countries should adopt the 'Model Law' with minimum changes.⁵³ Should a country adopt the 'Model Law' and then significantly change the 'Model Law's provisions when it enacts domestic legislation, it in fact runs contrary to the 'Model Law's aim to harmonise and unify national law.⁵⁴ The 'Model Law' has been adopted by many important trading partners of SA, both in BRICS, the Southern African Development Community (SADC) and beyond.⁵⁵

The 'SA Recognition and Enforcement of Foreign Arbitral Awards' attempts to give effect to the 'NY Convention', but has been criticised because it so significantly changes the 'NY Convention's provisions when it enacts the recognition and enforcement of foreign arbitration awards in domestic legislation, which in fact runs contrary to the 'NY Convention's aim to harmonise and unify national law.⁵⁶

The 'Washington Convention' resolves investment disputes between a signatory state or a government entity of a signatory state and a private investor or company from another signatory state.⁵⁷ The 'Washington Convention' led to the establishment of the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank in Washington, DC.⁵⁸ The 'Washington Convention's main objective is to build confidence between states and investors, in an attempt to increase investments in developing countries under reasonable conditions.⁵⁹

SALC recommended firstly the adoption of the 'Model Law on ICA'.⁶⁰ Since the 'Model Law on ICA', article 1(3) defines the concept "international arbitration," this definition should be used in SA legislation to determine which arbitrations qualify as international and are therefore subject to the 'Model Law'.⁶¹

SALC secondly recommended that the 'SA Recognition and Enforcement of Foreign Arbitral Awards' should be repealed and replaced with new legislation

⁵¹ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit s.p.*

⁵² *Ibid.*

⁵³ SALC 'Project 94' *op cit* p.21.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ UNCITRAL 'NY Convention (1958)' *op cit* article III; 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'.

⁵⁷ ICSID 'Washington Convention (1966)' *op cit s.p.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ SALC 'Project 94' *op cit* p.21.

⁶¹ SALC 'Project 94' *op cit* p.22.

to recognise and enforce foreign arbitration awards and to also define ‘foreign arbitration award’ and set out the grounds on which recognition and enforcement may be refused.⁶²

SALC thirdly recommended that SA emulate other African countries and ratify the ‘Washington Convention’, as this would create the necessary legal framework to encourage FDI and further economic development in SA and SADC.⁶³

No mention was made of online arbitration.

3.2. The ‘SA International Arbitration Bill of 1998’

As stated previously, the ‘SA Draft International Arbitration Bill’ is based on three main suggestions, namely, firstly, SA’s acceptance of the ‘Model Law on ICA’ for international arbitrations; secondly, the implementation of changes in the legislation that is based on the ‘NY Convention’, so as to reflect the changes in said ‘Convention’; and, thirdly, SA’s accession to the ‘Washington Convention’.⁶⁴

The two main elements of the ‘Model Law on ICA’ are the liberalisation of international arbitration by limiting the role of national courts, and the underlining of party autonomy by affording parties the freedom to decide how their disputes should be resolved.⁶⁵ Other important constituent parts include mandatory provisions that are included to ensure due process and fairness.⁶⁶ An added advantage is that the ‘Model Law’ sets out a framework on how to conduct an arbitration proceeding even when the parties are unable to agree on a procedure, with the result that the proceeding can still be finalised.⁶⁷ Importantly, it also contains provisions to help enforce awards and to simplify certain controversial practical matters.⁶⁸ The UN General Assembly already recommended in 1985 that all states should consider adopting the Model Law in an attempt to unify arbitration law and the specific requirements of parties and the arbitration industry.⁶⁹

Although SA’s BRICS (Brazil, Russia, India, China, SA) partner, India, and a SADC partner, Zimbabwe, in addition to countries such as Kenya and New Zealand, have decided to apply the ‘Model Law on International

⁶² ‘SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977’; SALC ‘Project 94’ *op cit* p.22.

⁶³ ICSID ‘Washington Convention (1966)’ *op cit s.p.*; SALC ‘Project 94’ *op cit* p.22.

⁶⁴ UNCITRAL ‘Model Law on ICA (1985/2006)’ *op cit s.p.*; UNCITRAL ‘NY Convention (1958)’ *op cit s.p.*

⁶⁵ ICSID ‘Washington Convention (1966)’ *op cit s.p.*; SALC ‘Project 94’ *op cit* par.1.7.

⁶⁶ UNCITRAL ‘Model Law on ICA (1985/2006)’ *op cit s.p.*; SALC ‘Project 94’ *op cit* par.1.9.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

Commercial Arbitration of 1985' to both domestic and international arbitration, the SALC advised that SA should not go this way.⁷⁰ Another way in which the 'Model Law' could be applied to domestic arbitration is the route which Australia, Bermuda, Scotland and Singapore went.⁷¹ SALC however advises that SA also not follow this route.⁷²

SALC only proposed two minor changes to the wording of the 'Model Law' when it is enacted in SA legislation, namely, firstly, the definition of an arbitration agreement in writing has been extended to deal with practical challenges and uncertainties that parties experience in practice.⁷³ Secondly, in an attempt to save expenses and to accelerate an arbitration proceeding, SALC proposed that the arbitration tribunal should appoint a single arbitrator, instead of three arbitrators, unless the parties agree otherwise.⁷⁴ In addition, in an attempt to ensure that the 'Model Law' is interpreted and applied in SA as was intended by its drafters, and to further unify SA law with the law of other countries who has enacted the 'Model Law', the 'SA Draft International Arbitration Bill' makes provision for the *travaux préparatoires* of the 'Model Law' to be used to assist with interpretation.⁷⁵

SALC also proposed the inclusion of further provisions to make the 'Model Law on International Commercial Arbitration' more efficient in SA.⁷⁶ These provisions have bearing on arbitration immunity,⁷⁷ conciliation (as stated above),⁷⁸ costs and interest.⁷⁹ The 'Model Law' has no intention to change national law on arbitrability, in other words, whether a particular issue may be resolved by arbitration instead of the courts in terms of the applicable law.⁸⁰ The 'Model Law', article 1(5) states clearly that the 'Model Law' may not affect other laws of the relevant state pertaining to the arbitrability of disputes.⁸¹ The SA law on arbitrability has been clarified over the years:⁸² the common-law prevents arbitration in criminal matters; the 'SA Insurance Act 27 of 1943', article 63(1)

⁷⁰ 'Indian Conciliation and Arbitration Act 26 of 1996/2015'; 'Kenyan Arbitration Act 4 of 1995'; 'New Zealand Arbitration Act 99 of 1996/2011'; 'Zimbabwean Arbitration Act 6 of 1996'; UNCITRAL '*Model Law on ICA (1985/2006)*' *op cit s.p.*; SALC '*Project 94*' *op cit* par.1.10; par.2.275.

⁷¹ 'Australian International Arbitration Act 136 of 1974/2015'; 'Bermuda International Conciliation and Arbitration Act 29 of 1993'; 'Scottish Arbitration Act 1 of 2010'; 'Singaporean Arbitration Act 28 of 2001'; SALC '*Project 94*' *op cit* par.1.10; par.2.275.

⁷² *Ibid.*

⁷³ SALC '*Project 94*' *op cit* par.1.13; par.2.15; par.2.130-par.2.136; Annexure E, draft article 2(1).

⁷⁴ SALC '*Project 94*' *op cit* par.1.13; Annexure E, draft article 10(2).

⁷⁵ UNCITRAL '*Model Law on ICA (1985/2006)*' *op cit s.p.*; SALC '*Project 94*' *op cit* par.1.13; par.2.52-par.2.61; Annexure E, draft article 8.

⁷⁶ UNCITRAL '*Model Law on ICA (1985/2006)*' *op cit s.p.*; SALC '*Project 94*' *op cit* par.1.14.

⁷⁷ SALC '*Project 94*' *op cit* par.2.62-par.2.67; Annexure E, draft article 9.

⁷⁸ SALC '*Project 94*' *op cit* par.1.14.

⁷⁹ SALC '*Project 94*' *op cit* par.1.14; Annexure E, draft article 31(5); draft article 31(6).

⁸⁰ UNCITRAL '*Model Law on ICA (1985/2006)*' *op cit s.p.*; SALC '*Project 94*' *op cit* par.1.14; par.2.40-2.51.

⁸¹ UNCITRAL '*Model Law on ICA (1985/2006)*' *op cit* article 1(5); SALC '*Project 94*' *op cit* par.1.14; par.2.40-2.51.

⁸² SALC '*Project 94*' *op cit* par.1.14.

prohibits arbitration on insurance disputes and the 'SA Arbitration Act', article 2 also contains restrictions.⁸³

The 'SA Draft International Arbitration Bill' also states that the only way in which arbitration proceedings will be consolidated in SA law is when the parties agree.⁸⁴ It also sets out the court's powers on interim measures to reduce parties' chances for forum-shopping, referring a dispute to court proceedings or to play delaying tactics.⁸⁵ An addition also sets out more clearly the procedure in the 'Model Law' for the court's assistance when evidence needs to be taken.⁸⁶ The concept 'public policy' as a ground for the court to set an arbitration award aside or the refusal of an application to court for the enforcement of an award on the grounds of 'public policy' has been made clearer by stating that it must then relate to serious procedural irregularities, such as a breach of the arbitration tribunal's duty to act fairly.⁸⁷ Typically, an application for setting an award aside has to be brought within three months after the award was made.⁸⁸ A provision was added to exclude this time limit whenever the award is opposed due to an allegation of corruption or fraud.⁸⁹ Lastly, the provision on the power of an arbitration tribunal to order interim measures was also changed in two ways, firstly, it sets out that the arbitration tribunal may order appropriate security for costs, unless the parties agreed otherwise.⁹⁰ Secondly, the order of the arbitration tribunal on interim measures may be enforced as if it were an award.⁹¹

The second important element of the 'SA Draft International Arbitration Bill' is to ameliorate legislation to properly apply the 'NY Convention'.⁹² The 'SA Recognition and Enforcement of Foreign Arbitration Awards Act', has been criticised when it comes to the definition of 'foreign arbitration award', its neglect to adequately provide for the enforcement of arbitration agreements, challenges with the grounds on which enforcement of a foreign award may be refused, and the challenges that arise from enforcing an award in a foreign currency.⁹³ These matters and other challenges are contained in the 'SA Draft International

⁸³ 'SA Insurance Act 27 of 1943'; 'SA Arbitration Act 42 of 1965'; SALC '*Project 94*' *op cit* par.1.14; par.2.40-2.51.

⁸⁴ SALC '*Project 94*' *op cit* par.1.14; par.2.40-par.2.51; Annexure E, draft article 7.

⁸⁵ SALC '*Project 94*' *op cit* par.2.140-par.2.158; Annexure E, draft article 9.

⁸⁶ UNCITRAL '*Model Law on ICA (1985/2006)*' *op cit s.p.*; SALC '*Project 94*' *op cit* par.1.14; par.2.211-par.2.220; Annexure E, draft article 27(2).

⁸⁷ SALC '*Project 94*' *op cit* par.1.14; par.2.261-par.2.163; par.2.269; Annexure E, draft article 34(5); draft article 36(3).

⁸⁸ SALC '*Project 94*' *op cit* par.1.14.

⁸⁹ SALC '*Project 94*' *op cit* par.1.14; par.2.264; Annexure E, draft article 34(3).

⁹⁰ SALC '*Project 94*' *op cit* par.1.14.

⁹¹ SALC '*Project 94*' *op cit* par.1.14; par.2.183-par.2.191; Annexure E, draft article 17(2); draft article 17(3).

⁹² UNCITRAL '*NY Convention (1958)*' *op cit s.p.*; SALC '*Project 94*' *op cit* par.1.15.

⁹³ 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'; SALC '*Project 94*' *op cit* par.1.15.

Arbitration Bill', Chapter 3 and are proposed to replace the 'SA Recognition and Enforcement of Foreign Arbitration Awards Act'.⁹⁴ This 'Act' will be repealed if the proposal is accepted.⁹⁵

The third important element is that SA should adopt the 'Washington Convention'.⁹⁶ This 'Convention' established the International Centre for Settlement of Investment Disputes (ICSID), situated at the World Bank in Washington, DC, which resolves investment disputes by means of conciliation and arbitration between contracting states or government entities of such a contracting state and nationals of other contracting states.⁹⁷ The objective of the 'Washington Convention' is to cultivate a climate of mutual confidence between states and foreign investors, in an attempt to increase FDI in the developing world.⁹⁸ The 'Washington Convention' has a high degree of international acceptance as it has already been signed or ratified by 161 signatory and contracting states.⁹⁹ The only other SADC state which still has to accede to the 'Washington Convention' is Namibia; Namibia has signed it in 1998, but has still not ratified it.¹⁰⁰

As soon as SA could ratify the 'Washington Convention', it will create the necessary legal framework to encourage FDI.¹⁰¹ Bilateral Investment Treaties (BITs) between states, especially among a developed and a developing state usually makes provision for arbitration in terms of ICSID in an attempt to lure FDI to such a developing country.¹⁰² SA companies investing in SADC and/or Africa will likely experience that SA's ratification of the 'Washington Convention' would facilitate FDI and encourage the economic development of SADC and/or Africa, as nearly all of these countries are already ICSID members.¹⁰³ The inclusion of ICSID arbitration provisions in BITs which the SA government recently concluded with the governments of Canada, Denmark, France, Germany, Korea, Switzerland, has already started to create the expectation that SA intends to accede to the 'Washington Convention' in the future.¹⁰⁴

Acceding to the 'Washington Convention' is very important for SA because ICSID is the only arbitration institution that resolves state and investor investment disputes in terms of public international law.¹⁰⁵ It also has the

⁹⁴ 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'; SALC 'Project 94' *op cit* par.1.15; par.3.89-par.3.95; Annexure E, Chapter 3.

⁹⁵ SALC 'Project 94' *op cit* par.1.15.

⁹⁶ ICSID 'Washington Convention (1966)' *op cit s.p.*; SALC 'Project 94' *op cit* par.1.16.

⁹⁷ SALC 'Project 94' *op cit* par.1.16.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ ICSID 'Washington Convention (1966)' *op cit s.p.*; SALC 'Project 94' *op cit* par.1.17.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ SALC 'Project 94' *op cit* par.1.18.

advantage that it reduces the involvement of foreign state courts to a minimum, and that this reduces the sensitivity surrounding national sovereignty.¹⁰⁶ Another advantage is that when there is no agreement to the contrary, the arbitration tribunal is usually obliged to apply the law of the state party.¹⁰⁷

3.3. SALC Project 94, 'Second Report: Domestic Arbitration'

In SALC's Report on Project 94: 'Arbitration: An International Arbitration Act for SA,' of July 1998, they found that the 'SA Arbitration Act' was defective for the purpose of international arbitration.¹⁰⁸ SALC then recommended in this Report that the 'Model Law on ICA' should be enacted as part of SA national legislation, for domestic as well as international arbitration.¹⁰⁹

However, in May 2001, the SALC came to a whole different conclusion in a second report of Project 94, entitled; 'Domestic Arbitration,' and recommended instead against adopting the 'Model Law on ICA' for both domestic and international arbitration in SA as they felt that international arbitration is such a complex field that it should not be combined with domestic arbitration, besides, as said previously, the intention is to enact a Model Law with as few changes as possible.¹¹⁰

Instead, SALC recommended that a new domestic arbitration act should be enacted which should combine the best features of the 'Model Law on ICA' and the 'UK's Arbitration Act', as well as certain provisions of the 'SA Arbitration Act' which has proven to be practical.¹¹¹ SALC however made a distinction in the regard that the 'Draft International Arbitration Bill' will for the greater part enact the 'Model Law on ICA' and that this will not be used for domestic arbitration as initially intended.¹¹²

3.4. The 'Report on Racism in the Cape Provincial Division' of Hlophe J of the Cape Provincial Division of the High Court of SA

The 'Draft International Arbitration Bill' had been approved by the SA Cabinet and certified by the state law advisors in 2011, but thereafter the relevant ministerial powers-that-be were perusing the Bill with a view of laying it

¹⁰⁶ SALC 'Project 94' *op cit* par.1.18.

¹⁰⁷ *Ibid.*

¹⁰⁸ Schulze 'Of Arbitration, Politics and the Price of Neglect' *SA Mercantile LJ* 23(2011) 291; SALC 'Domestic Arbitration Report: An Arbitration Act for SA (July 1998) (First Report)' *op cit s.p.*

¹⁰⁹ *Ibid.*

¹¹⁰ Schulze *op cit* 291; SALC 'Domestic Arbitration Report: An Arbitration Act for SA (May 2001) (Second Report)' *op cit s.p.*

¹¹¹ Butler 'SA Arbitration Legislation' *Comparative and International Law Quarterly of Southern Africa* 27(1994) 118.

¹¹² Ramsden *op cit* 18-9.

before the SA Parliament; something which did not happen until recently.¹¹³ Indications were that the matter did not enjoy high priority in the SA Department of Justice.¹¹⁴

The SA government has never officially stated why it did not proceed with introducing the 'SA Draft International Arbitration Bill' in the SA Parliament, but the lack of political will and appetite for reforming specifically arbitration law appears to be partly explained by the already mentioned judicial report, entitled; 'Report on Racism in the Cape Provincial Division;' which the Judge President of the Cape High Court, Hlophe JP, published in 2004 in which he made arbitration a bone of contention by coming to the conclusion that arbitration was inherently racist and inimical to the post-Apartheid reform and development of the SA court system.¹¹⁵ To come to this conclusion, Hlophe claimed that; "white advocates, particularly senior ones, have no confidence in blacks being able to adjudicate in commercial cases and therefore they remove [commercial cases] from the system and refer them to arbitration."¹¹⁶ He went on by saying that; "[arbitration] undermines the ordinary courts of the land. Private interests are competing with the present legal system in the country. There is a real danger that some public interest disputes are being taken out of the legal mainstream. This is clearly an attempt to undermine the transformation of the judiciary. Arbitration does not contribute towards the development of the law, because of proceedings are not publicly recorded they cannot serve as precedents in the courts of law. This is one area I would recommend that arbitration should be limited to purely private disputes between the parties. Where public interest matters are involved private arbitration is inappropriate as it undermines the legal system and the transformation of the judiciary, neither of which can be compromised. I would furthermore recommend that where public funds are involved, the various state departments should proceed with extreme caution and generally should discourage the use of arbitration proceedings. Perhaps this is one area that requires urgent parliamentary attention because we cannot continue having the law courts undermined by arbitration, as is happening currently. I would also submit that to the extent that retired judges are heavily involved in arbitration proceedings, even though they are still on the government's payroll, should be discouraged and the legislation amended in such a way that it should not be possible for such retired judges to be a part of arbitration proceedings, thereby undermining the system of justice in this country."¹¹⁷

Despite this Report and the disastrous impact that it has had for arbitration in SA, the country's image overseas, and for making SA attractive to

¹¹³ Schulze *op cit* 292.

¹¹⁴ *Ibid.*

¹¹⁵ Hlophe 'Report on Racism in the Cape Provincial Division' *op cit* s.p.; Ewers *et al.* *op cit* 8–9.

¹¹⁶ Hlophe 'Report on Racism in the Cape Provincial Division' *op cit* p.31.

¹¹⁷ *Ibid.*

foreign investors, one can only hope that for the sake of SA's international standing and its attractiveness to FDI and that to advance international trade, that the proposed legislation on international arbitration is indeed passed in the very near future.¹¹⁸ The arguments in favour of modernising SA's arbitration law are without a doubt stronger than those of the detractors.¹¹⁹

3.5. Reforms in SA Domain Name Authority's OADR in 2006

The '.za Domain Name Authority (.za DNA, also referred to as 'ZADNA')' is a SA non-profit organisation which regulates all of SA's .za top level domain (TLDs) namespace on the Internet.¹²⁰ .za DNA must account to the SA Department of Telecommunications and Postal Services, but does not receive funding from government.¹²¹ Some Service Level Domain Names (SLDs), such as .co.za and web.za are open for registrations from both SA residents and non-SA residents.¹²²

.za Domain Name Authority has a large mandate, which includes, but is not limited to the administration and management of the .za domain name space, the issuing and regulation of registries, publishing guidelines on the administration of the .za domain name space and the process of registering a domain name. Also, to undertake investigations that is necessary to respect and uphold rights and responsibilities of parties in order to manage and administer the .za domain name space.¹²³

In May 2007, .za DNA announced that it had approved a formal regulated ADR process, namely the 'SA Institute of Intellectual Property Law (SAIIPL)'s Domain Disputes Regulations of 2006', to resolve domain name disputes without the need of a lawyer.¹²⁴

When infringements occur with regards to registered trademarks and trading names in the .co.za space, they are regulated in terms of either the 'SA ECTA' or the 'SA Institute for Intellectual Property Law (SAIIPL)'s Domain

¹¹⁸ Ewers *et al.* *op cit* 8–9.

¹¹⁹ *Ibid.*

¹²⁰ .za DNA 'Who We Are', *s.p.* at <<http://www.zadna.org.za/content/page/who-we-are>>, accessed 11 October 2016; Snail *et al.* 'A Brief Excursus on SA Dispute Resolution', *s.p.* at <<http://www.domaindisputes.co.za/news4.php?newsID=30>>, accessed 11 October 2016; .za DNA 'New Regulations Aim to Resolve SA Name Disputes', *s.p.* at <<http://www.zadna.org/>>, accessed 11 October 2016.

¹²¹ *Ibid.*

¹²² .za DNA 'Domain Information', *s.p.* at <<http://www.zadna.org.za/content/page/domain-information>>, accessed 11 October 2016

¹²³ .za DNA 'Our Mandate', *s.p.* at <<http://www.zadna.org.za/content/page/our-mandate>>, accessed 11 October 2016

¹²⁴ Snail *et al.* 'A Brief Excursus on SA Dispute Resolution' *op cit s.p.*; .za DNA 'New Regulations Aim to Resolve SA Name Disputes' *op cit s.p.*

Disputes Regulations in 2006' or both.¹²⁵ To resolve disputes pertaining to infringements on registered trademarks and trading names in the .co.za space, SAIPL and the Arbitration Foundation of SA (AFSA) are at the moment the only two accredited ADR service providers.¹²⁶

3.5.1. Grounds for filing a dispute in terms of 'SAIPL's Domain Disputes Regulations' and possible defenses

Before SAIPL's Domain Disputes Regulations of 2006' was promulgated, many domain name disputes were left unresolved in SA.¹²⁷ Parties were hesitant to incur the legal representation expenses as litigation is costly, and even then there is no guarantee of success; a possible negative finding against the plaintiff could even entail an adverse cost order.¹²⁸ Now in terms of 'SAIPL's Domain Disputes Regulations' a complainant may refer a case to ADR if an abusive and/or offensive domain name has been registered.¹²⁹

The 'Domain Disputes Regulations', article 3(1) states that a complainant in domain name disputes based on an alleged abusive registration, needs to prove, on a balance of probabilities, to the arbitrator, that firstly, (a) s/he has rights in respect of a name or mark and that the domain name or trade mark is identical or similar to the domain name or trade mark,¹³⁰ and that (b) the domain name which was registered is an abusive registration.¹³¹

3.5.2. 'SAIPL's Domain Disputes OADR Procedure'

The 'Domain Disputes Regulations' now allow parties to file a complaint relating to registered .co.za domain if it is an abusive or offensive registration.¹³² The procedure is easy to understand, relatively inexpensive and user-friendly.¹³³

The costs to refer a dispute for arbitration vary from ZAR10 000 for a single arbitrator up to ZAR23 000, for a panel of three arbitrators.¹³⁴ .za DNA is permitted to fund a dispute in special instances, and 10 percent of each fee is

¹²⁵ 'SA ECTA 25 of 2002'; SAIPL 'Domain Disputes Regulations (2006)' at <<http://www.domaindisputes.co.za/content.php?tag=7>>, accessed 11 October 2016; Edmunson *et al.* 'The ADR Regulations Applying to Disputes over .za Domain Names in SA' *BNA International* (September 2007) *s.p.*; Snail *et al.* 'A Brief Excursus on SA Dispute Resolution' *op cit s.p.*

¹²⁶ Snail *et al. op cit. s.p.*

¹²⁷ 'SA ECTA 25 of 2002'; Edmunson *et al. op cit. s.p.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ SAIPL 'Domain Disputes Regulations (2006)', article 3(1)(a) at <<http://www.domaindisputes.co.za/content.php?tag=7>>, accessed 11 October 2016.

¹³¹ SAIPL 'Domain Disputes Regulations (2006)' *op cit* article 3(1)(b).

¹³² Viljoen 'In Pursuit of the Cyberpirates: The New ADR System for .co.za Domain Name Complaints' *De Rebus* (November 2007) *s.p.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

deposited to .za DNA for this purpose.¹³⁵ The complainant must file the complaint at Domain Disputes in either online format or paper copy format.¹³⁶ Since the complainant is *dominis litis*, all notices of service and other related documents, be it in online or paper copy, must be submitted to the administrator at Domain Disputes who will then deliver all notices and pleadings to the parties.¹³⁷ Twenty days after the proceeding began, the registrant must submit a response and the complainant then has five days to reply.¹³⁸ Domain Disputes will thereafter select an arbitrator to resolve the dispute in two weeks' time.¹³⁹ Arbitrators need to have regard of preceding decisions made in terms of the 'Domain Disputes Regulations' and are also required to list the decisions they considered in order to reach their decision.¹⁴⁰

3.6. The 'SA Promotion and Protection of Investment Act 22 of 2015'

The debate surrounding the updating of the 'SA Arbitration Act' gathered momentum when the 'SA Promotion and Protection of Investment Act' was adopted.¹⁴¹ The reason for this is that the latter has the aim to provide for the legislative protection of investors and to promote FDI in SA.¹⁴²

However, in terms of the 'SA Promotion and Protection of Investment Act', foreign investors (which will include parties to an online arbitration proceeding) no longer enjoy a general right to opt for international arbitration to resolve investment disputes.¹⁴³ Instead, a foreign investor whose dispute was caused by some action or omission from the SA government or any organ of state, may in terms of article 13(1) refer the dispute to mediation facilitated by the Department of Justice, or in terms of article 13(4) to the local courts, or, in terms of article 13(5) to arbitration in terms of the 'SA Arbitration Act'.¹⁴⁴

Article 13 appears to be a deliberate decision on the part of the SA Parliament not to follow the route of international arbitration, most likely due to

¹³⁵ .za DNA 'FAQ', s.p. at <<http://www.zadna.org.za/faq>>, accessed 11 October 2016.

¹³⁶ *Ibid.*

¹³⁷ .za DNA 'How to Register a Dispute?', s.p. at <<http://www.zadna.org.za/content/page/how-to-register-a-dispute>>, accessed 11 October 2016.

¹³⁸ *Ibid.*

¹³⁹ *Telkom SA Limited and TDS Directory Operations (Pty) v The Internet Corporation* [ZA2007-0005] 2; Viljoen *op cit.* s.p.

¹⁴⁰ Edmunson *et al. op cit.* s.p.

¹⁴¹ 'SA Arbitration Act 42 of 1965'; 'SA Promotion and Protection of Investment Act 22 of 2015'; Baker *op cit.* s.p.

¹⁴² 'SA Promotion and Protection of Investment Act 22 of 2015'; Baker *op cit.* s.p.

¹⁴³ *Ibid.*

¹⁴⁴ 'SA Arbitration Act 42 of 1965'; 'SA Promotion and Protection of Investment Act 22 of 2015', article 13(1); article 13(4); article 13(5); Baker *op cit.* s.p.

the uncertainty of international arbitration as well as the absence of the doctrine of precedent.¹⁴⁵

On 3 November 2015 the 'SA Promotion and Protection of Investment Act' was passed in the SA Parliament despite staunch opposition.¹⁴⁶ It is not difficult to understand why there has been opposition to the 'Act' and consequently this section will firstly look at the background of how the 'Act' was passed. Secondly, the expropriation provision which the 'First SA Promotion and Protection of Investment Bill of 2013' contained. Thirdly, the stance of the 'First SA Promotion and Protection of Investment Bill' towards international arbitration. Fourthly, whether the 'SA Promotion and Protection of Investment Act' affords equal treatment to foreign investors. Fifthly, at the unilateral nature of the 'Act', and lastly it will look at the current reality.

3.6.1. The Background of the 'SA Promotion and Protection of Investment Act 22 of 2015'

The 'Promotion and Protection of Investment Bill' was introduced in the SA Parliament in 2013.¹⁴⁷ This Bill made no provision for online arbitration. A writer such as Farish is of the opinion that the 'First Bill' was influenced by the ICSID case of *Piero Foresti, Laura de Carli and Others v RSA*, which prompted the SA government to review its investment laws and regulations.¹⁴⁸ The SA government became concerned after foreign investors started challenging the SA policy of Black Economic Empowerment (BEE) in international arbitration.¹⁴⁹ In this case, the arbitration panel was headed by two American arbitrators and one British arbitrator, none of which seemed to have had much knowledge of SA's history and policies.¹⁵⁰ The SA government then grew concerned that certain SA governmental policies, such as BEE, would not be protected through ADR and more specifically, international arbitration.¹⁵¹

At the time when the 'First Promotion and Protection of Investment Bill' was introduced in the SA Parliament in 2013, many Bilateral Investment Treaties

¹⁴⁵ 'SA Arbitration Act 42 of 1965'; 'SA Promotion and Protection of Investment Act 22 of 2015', article 13(1); article 13(4); article 13(5); Bakerop *cit s.p.*

¹⁴⁶ 'SA Promotion and Protection of Investment Act 22 of 2015'; Bakerop *cit s.p.*

¹⁴⁷ SA DTI 'First Promotion and Protection of Investment Bill of 2013' at <https://www.thedti.gov.za/gazettes/Promotion_Protection_Investment_Bill.pdf>, accessed 11 October 2016.

¹⁴⁸ SA DTI 'First Promotion and Protection of Investment Bill of 2013' *op cit s.p.*; *PieroForesti, Laura de Carli and Others v RSA* ICSID case no. ARB(AF)/07/1.

¹⁴⁹ SA DTI 'Black Economic Empowerment Strategy' at <http://www.thedti.gov.za/economic_empowerment/bee-strategy.pdf>, accessed 11 October 2016; *Piero Foresti, Laura de Carli and Others v RSA* ICSID case no. ARB(AF)/07/1.

¹⁵⁰ *PieroForesti, Laura de Carli and Others v RSA* ICSID case no. ARB(AF)/07/1; Farish 'Protection of Investments Act' *De Rebus* (25 April 2016), *s.p.* at <<http://www.derebus.org.za/protection-investments-act-balancing-act-policies-investments/>>, accessed 11 October 2016.

¹⁵¹ Farish *op cit s.p.*

(BITs) between SA and its trading partners, which had previously governed the respective FDI regimes, started to lapse, 20 years after 1994.¹⁵² The harsh criticism on the 'First Promotion and Protection of Investment Bill', together with the lapsing of the BITs, led to the introduction of a revised 'Second Promotion and Protection of Investment Bill' in the SA Parliament in 2015.¹⁵³ This Bill also made no provision for online arbitration. The 'Second Promotion and Protection of Investment Bill' was passed by the SA Parliament and was enacted as the 'SA Promotion and Protection of Investment Act'.¹⁵⁴ As a result, this Act makes no provision for online arbitration. This 'Act' also unfortunately does little to quell the concerns of foreign investors have to invest FDI to SA.¹⁵⁵

3.6.2. International Arbitration in terms of the 'SA Promotion and Protection of Investment Act 22 of 2015'

The 'First Promotion and Protection of Investment Bill' made no provision for international arbitration, nor online arbitration, and this necessarily led to a chorus of disapproval from FDI investors.¹⁵⁶

The 'SA Promotion and Protection of Investment Act' tried to calm investors by inserting article 13(5) which states that an investor may opt for international arbitration, but only after domestic remedies have been exhausted and thereafter only if the government consents to such arbitration.¹⁵⁷ No mention was however made of online arbitration. The provision of this limited recourse to international arbitration is of course not only a step backwards for international arbitration in SA, but also a step backwards towards attracting FDI to SA as investors view access to international arbitration as a degree of security to their investment.¹⁵⁸

Any investor from the developed world would be uncertain whether a developing world country has efficient and proper functioning and whether the skills and expertise of potential arbitrators are of the required standard to deal with intricate e-commerce disputes amounting to large sums of money.¹⁵⁹ Any such investor would also be cautious of litigation or arbitration in a developing world country as s/he will be suspicious of prejudice against a foreign subject to

¹⁵² SA DTI 'First Promotion and Protection of Investment Bill of 2013' *op cit s.p.*; Davis 'SA's New Investment Legislation slips in under the Radar', *s.p.* at <<http://ewn.co.za/2016/01/20/Zuma-quietly-signs-investment-bill-signed-into-law>>, accessed 11 October 2016; Farishop *cits.p.*

¹⁵³ SA DTI 'First Promotion and Protection of Investment Bill of 2013' *op cit s.p.*; Davis 'SA's New Investment Legislation slips in under the Radar' *op cit s.p.*

¹⁵⁴ 'SA Promotion and Protection of Investment Act 22 of 2015'; Baker *op cit s.p.*

¹⁵⁵ *Ibid.*

¹⁵⁶ SA DTI 'First Promotion and Protection of Investment Bill of 2013' *op cit s.p.*; Baker *op cit s.p.*

¹⁵⁷ SA Promotion and Protection of Investment Act 22 of 2015, article 13(5); Baker *op cit s.p.*

¹⁵⁸ Baker *op cit s.p.*

¹⁵⁹ *Ibid.*

the advantage of a local subject – in other words that local interests may be placed ahead of international interests.¹⁶⁰

The SA Minister of Trade and Industry, Dr Rob Davies, MP, who is a strong adherent of the 'SA Promotion and Protection of Investment Act', however saw things differently and stated in the Parliamentary debate preceding the acceptance of the Bill, that strictly regulating international arbitration will better protect the local economy as he deems arbitration to be unpredictable in outcome.¹⁶¹ He said that it will be easier to predict the outcome of litigation as SA courts will have, most likely, dealt with the same or very similar situations domestically and already reached decisions in similar matters.¹⁶² Contrary hereto, he felt that arbitration findings may run against the policies of the SA government and what it attempts to achieve and/or lead to legal uncertainty.¹⁶³

Since there are already so many factors detracting FDI from SA, ranging from a lack of online arbitration legislation to labour unrest to excessive taxation, the strict regulation of when international arbitration may be resorted to, will only add to these factors and make that investors will go elsewhere with their FDI to where greater certainty is provided.¹⁶⁴

3.6.3. The Current Reality of the 'SA Promotion and Protection of Investment Act 22 of 2015'

It is evident that there are many concerns with the 'SA Promotion and Protection of Investment Act'.¹⁶⁵ One of these is the fact that it does not include online arbitration, another is that the SA government is placing local interests and policies ahead of the interests of foreign investors to such an extent that it is actually to the detriment of foreign investors.¹⁶⁶ For a developing country with a small bargaining position such as SA, which needs to compete with an array of other developing countries from around the world, SA is not supposed to alienate investors.¹⁶⁷

¹⁶⁰ Farish *op cit s.p.*

¹⁶¹ Minister Rob Davies, MP 'Debate on the Protection of Investment Bill, 2015', s.p. at <<http://www.gov.za/speeches/minister-rob-davies-debate-protection-investment-bill-2015-17-nov-2015-0000>>, accessed 11 October 2016; 'SA Promotion and Protection of Investment Act 22 of 2015'; Farish *op cit s.p.*

¹⁶² Minister Rob Davies, MP 'Debate on the Protection of Investment Bill, 2015' *op cit s.p.*; Bosman 'SA: Trading International Investment for Policy Space', 14-15 at <<file:///C:/Documents%20and%20Settings/Julian/My%20Documents/Downloads/wp-04-2016.pdf>>, accessed 11 October 2016.

¹⁶³ Bosman 'SA: Trading International Investment for Policy Space' *op cit* 14-15.

¹⁶⁴ *Ibid.*

¹⁶⁵ 'SA Promotion and Protection of Investment Act 22 of 2015'; Baker *op cit s.p.*

¹⁶⁶ *Ibid.*

¹⁶⁷ Baker *op cit s.p.*

SA should revisit how to strike a balance between protecting its own policies and simultaneously encouraging investment, by making provision for online arbitration.¹⁶⁸ The 'SA Promotion and Protection of Investment Act' has not succeeded in striking this balance and the 'Act' will most definitely have an adverse effect on luring investors.¹⁶⁹

Added to limitations that the 'SA Promotion and Protection of Investment Act', article 13(5) places on arbitration by stating that an investor may opt for international arbitration, but only after domestic remedies have been exhausted and thereafter only if the government consents to such arbitration, are all of the additional failings of the 'SA Arbitration Act'.¹⁷⁰

3.7. SALRC's Mandate to Update the 'SA Draft International Arbitration Bill'

Since so many years has passed since the SALC's reports 'Arbitration: an International Arbitration Act for SA' of July 1998 and the 'Report on Domestic Arbitration' were published in 1998 and 2001, and since so many developments occurred in the field of international arbitration since then, the SA Department of Justice has instructed the SA Law Reform Commission (SALRC), previously the SA Law Commission (SALC), to update the 'SA Draft International Arbitration Bill' and the 'SA Draft Domestic Arbitration Bill'.¹⁷¹ SALRC has confirmed that the two Bills will not be combined into a single act and that international arbitration and domestic arbitration will both be regulated by separate pieces of legislation.¹⁷²

The SALC stated in its 'Report on International Arbitration' of 1998, paragraph 1.7 that the 'SA Draft International Arbitration Bill' is based on three cornerstones: firstly, SA's adoption of the 'Model Law on ICA of 1985'.¹⁷³ Since the 'Model Law on ICA of 1985' has been amended in 2006, provision will have be made to implement these amendments into the 'SA Draft International Arbitration Bill'. Secondly, changes need to be made to the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act' which is based on the 'NY

¹⁶⁸ Farish *op cit s.p.*

¹⁶⁹ 'SAPromotion and Protection of Investment Act 22 of 2015'; Farish *op cit s.p.*

¹⁷⁰ 'SA Arbitration Act 42 of 1965'; 'SA Promotion and Protection of Investment Act 22 of 2015', article 13(1); Baker *op cit s.p.*

¹⁷¹ SALC 'Project 94' *op cit s.p.*; SALC 'Domestic Arbitration Report (May 2001) (Second Report)', *s.p.* at <http://www.justice.gov.za/salrc/reports/r_prj94_dom2001.pdf>, accessed 11 October 2016; SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998', par.1.08 at <<http://webcache.googleusercontent.com/search?q=cache:eFsGYJDLMeoJ:disac.co.za/wp-content/uploads/2014/12/Draft-Summary-of-Updated-International-Bill-July-2013-2.docx+&cd=1&hl=en&ct=clnk&gl=za>>, accessed 11 October 2016.

¹⁷² *Ibid.*

¹⁷³ SALC 'Project 94' *op cit* par.1.7, p.103-104; SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' *op cit* par.1.09.

Convention'.¹⁷⁴ Thirdly, it was advised that SA should accede to the 'Washington Convention'.¹⁷⁵

3.7.1. Amendments to the 'SA Draft International Arbitration Bill'

With regards to the amendments that the SALRC proposed to the 'New SA Draft International Arbitration Bill', certain draft articles are worth noting.¹⁷⁶

Firstly, the long title has been amended in two ways: firstly, by specifically referring to the 'Model Law on ICA', to make it clear that the 'New SA International Arbitration Act' will enact the amended version of the 'Model Law'.¹⁷⁷ Secondly, the long title no longer mentions the 'Washington Convention'.¹⁷⁸

The 'SA Draft International Arbitration Bill', Draft Chapter 1 contains the general provisions, and in this regard, the following amendments are noteworthy: firstly, the definitions that draft article 1 set out.¹⁷⁹ Article 1 s.v. 'arbitration agreement' was amended to implement the changed definition thereof as it occurs in the '2006-Amendments' to the 'Model Law on ICA', Schedule 1, article 7.¹⁸⁰ This point will be elaborated upon when draft article 7 is evaluated below.

The 'SA Draft International Arbitration Bill', article 1 s.v. 'the Model Law' was amended to specifically refer to the 'Model Law on ICA'.¹⁸¹ The 'SA Draft International Arbitration Bill', article 1 s.v. 'the Model Law' elucidates that the version of 'the Model Law' contained in Schedule 1 is the amended version of 2006, and no longer the older 1985 version.¹⁸²

¹⁷⁴ 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'; SALC *'Project 94' op cit* par.1.7, p.106-133.

¹⁷⁵ SALC *'Project 94' op cit* par.1.7, p.134-153.

¹⁷⁶ SALRC *'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' op cit* p.4.

¹⁷⁷ SA Department of Justice (DoJ) *'International Arbitration Bill' op cit* p.2; UNCITRAL *'Model Law on ICA (1985/2006)' op cit* Schedule 1, article 7; SALRC *'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' op cit* p.4.

¹⁷⁸ SALRC *'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' op cit* par.1.09; SALC *'Project 94' op cit* par.1.7, p.134-153.

¹⁷⁹ SA DoJ *'International Arbitration Bill'*, draft article 1 at <http://juta.co.za/media/filestore/2016/04/Draft_International_Arbitration_Bill_2016.pdf>, accessed 11 October 2016.

¹⁸⁰ SA DoJ *'International Arbitration Bill' op cit* draft article 1; UNCITRAL *'Model Law on ICA (1985/2006)' op cit* Schedule 1, article 7; SALRC *'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' op cit* p.4.

¹⁸¹ SA DoJ *'International Arbitration Bill' op cit* draft article 1; UNCITRAL *'Model Law on ICA (1985/2006)' op cit*.

¹⁸² SA DoJ *'International Arbitration Bill' op cit* Draft Chapter 1: 'General Provisions', draft article 1; SALRC *'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' op cit* p.4.

Draft article 3 is about the objects of the 'Proposed SA International Arbitration Act', and in this regard the references to both the; "Washington Convention" and "investment arbitration" was excluded from the objects of the 'SA Draft International Arbitration Bill'.¹⁸³

Draft article 5 states that the 'Proposed SA International Arbitration Act' will be legally binding on public bodies.¹⁸⁴ This change can probably also be ascribed to the definition of 'public body' which has been added to the 'SA Draft International Arbitration Bill', article 1.¹⁸⁵

The 'SA Draft International Arbitration Bill', draft article 7 sets out the subject-matter of international commercial arbitration, and determines which disputes may be and may not be resolved by arbitration.¹⁸⁶ Draft article 7 was used to draft the 'SA Draft Bill for Domestic Arbitration', draft article 5(2) and draft article 5(3) which pertains to the subject-matter of arbitrability in domestic arbitration.¹⁸⁷ Both the 'SA Draft International Arbitration Bill', draft article 7(1) and the 'SA Draft Bill for Domestic Arbitration', draft article 5 states that arbitration should not be excluded simply because an act vests a court or other tribunal with jurisdiction to resolve a dispute which is covered by the arbitration agreement.¹⁸⁸

Draft article 11 regulates the confidentiality of arbitration proceedings.¹⁸⁹ The SALC, in its Report 'Arbitration: An International Arbitration Act for SA' of 1998, came to the conclusion that it is best to leave it to the courts to develop the law pertaining to the confidentiality of arbitration.¹⁹⁰ SALC however, in its report, 'Domestic Arbitration' of 2001, revisited this matter, and came to a different conclusion.¹⁹¹ SALC felt that it would be better to include article 34 in the 'SA Draft Domestic Arbitration Bill' for the sake of legal certainty as the different national courts interprets confidentiality differently and that this could

¹⁸³ SA DoJ 'International Arbitration Bill' *op cit* Draft Chapter 1: 'General Provisions', draft article 3; SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998', Chapter 1: 'General Provisions', *op cit* p.4.

¹⁸⁴ SA DoJ 'International Arbitration Bill' *op cit* Draft Chapter 1: 'General Provisions', draft article 5.

¹⁸⁵ SA DoJ 'International Arbitration Bill' *op cit* Draft Chapter 1: 'General Provisions', draft article 1; SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998', Chapter 1: 'General Provisions', *op cit* p.4.

¹⁸⁶ SA DoJ 'International Arbitration Bill' *op cit* Draft Chapter 2: 'International Commercial Arbitration', draft article 7.

¹⁸⁷ SA DoJ 'International Arbitration Bill' *op cit* Draft Chapter 2: 'International Commercial Arbitration', draft article 7; SA DoJ 'Domestic Arbitration Bill', article 5(2), article 5(3) at <https://www.google.co.za/?gws_rd=ssl#q=draft+domestic+arbitration+bill+SA>, accessed 11 October 2016.

¹⁸⁸ SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' *op cit* p.4.

¹⁸⁹ SA DoJ 'International Arbitration Bill' *op cit* Draft Chapter 1: 'General Provisions', draft article 11.

¹⁹⁰ SALC 'Project 94' *op cit* par.2.287.

¹⁹¹ SALC 'Domestic Arbitration Report (May 2001) (Second Report)' *op cit* par.3.179-par.3.181.

only lead to legal uncertainty.¹⁹² To promote uniformity, this provision of the 'SA Draft Domestic Arbitration Bill' should also apply to the 'SA Draft International Arbitration Bill'.¹⁹³

Draft article 22 regulates the refusal or recognition and subsequent enforcement of an arbitration award.¹⁹⁴ Draft article 22 attempts to implement the 'NY Convention', article V, which regulates the grounds on which the enforcement of a foreign arbitration award may be refused, in a better way than its equivalent provision in legislation, the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act', article 4.¹⁹⁵ SALRC pointed out that the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40', article 4 had different wording than article V and that this could lead to varying interpretations, with the result that article 4 did not give proper effect to the 'NY Convention', article V.¹⁹⁶ SALRC especially pointed out that the 'SA Constitution of 1996', article 233, which pertains to the application of international law, states that when any legislation is interpreted, every court must prefer any reasonable interpretation of legislation which is consistent with international law over any alternative interpretation which is inconsistent with international law.¹⁹⁷ The SALRC recommended as a result that the 'SA Draft International Arbitration Bill', draft article 22 should keep as close to the wording of the 'NY Convention', article V as possible.¹⁹⁸ SALRC said that this will enable SA courts to gain the most optimal use of foreign jurisprudence, when it will be required, to interpret article V.¹⁹⁹

3.7.2. The 'SA Draft International Arbitration Bill' approved by the SA Cabinet in 2016 for introduction to the SA Parliament

On 13 April 2016, the SA Cabinet gave its stamp of approval on the 'SA Draft International Arbitration Bill' and by doing so paved the way for its submission to the SA Parliament to be debated and hopefully approved by both

¹⁹² SALC 'Domestic Arbitration Report (May 2001) (Second Report)' *op cit* par.3.179-par.3.181; SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' *op cit* p.6.

¹⁹³ SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' *op cit* p.6.

¹⁹⁴ SA DoJ 'International Arbitration Bill' *op cit* Draft Chapter 1: 'General Provisions', draft article 22.

¹⁹⁵ UNCITRAL 'NY Convention (1958)' *op cit* article V; SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' *op cit* p.6.

¹⁹⁶ UNCITRAL 'NY Convention (1958)' *op cit* article V; 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977', article 4; SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' *op cit* p.6.

¹⁹⁷ UNCITRAL 'NY Convention (1958)' *op cit* article V; 'SA Constitution of 1996', article 233; SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' *op cit* p.6.

¹⁹⁸ *Ibid.*

¹⁹⁹ UNCITRAL 'NY Convention (1958)' *op cit* article V; SALRC 'Summary of Amendments to the Commission's Draft International Arbitration Bill of July 1998' *op cit* p.7.

the lower house, the National Assembly and the upper house, the National Council of Provinces (NCOP) of the SA Parliament.²⁰⁰

On 28 April 2016 the 'SA Draft International Arbitration Bill' and the concomitant 'Explanatory Memorandum' was circulated in the SA Government Gazette.²⁰¹ With this step of the process already been adhered to, the 'SA Draft International Arbitration Bill' will hopefully be introduced soon to the two houses of the SA Parliament for approval so as to be enacted as the 'SA International Arbitration Act'.²⁰²

It is anticipated that the proposed 'SA International Arbitration Act' will regulate all international arbitrations which are seated in SA, including commercial and investment arbitrations.²⁰³ The most significant transformation that the 'SA Draft International Arbitration Bill' will bring about when it is approved, is that the SA law will then discern between the law which regulates international arbitrations on the one side, by means of the incorporation of the 'Model Law on ICA' as part of the 'SA Draft International Arbitration Act'; and domestic arbitration on the other side which will still be regulated by the 'SA Arbitration Act', until the 'SA Draft Domestic Arbitration Bill' is approved at some point in future.²⁰⁴

The 'SA International Arbitration Bill' entails many highlights: firstly, article 5 binds all public bodies.²⁰⁵ Secondly, the 'Model Law on ICA', will, subject to certain exclusions, be enacted in SA in terms of 'SA Draft Arbitration Bill', article 3(a).²⁰⁶ Thirdly, international commercial arbitrations with public bodies to the extent not prohibited by the 'SA Promotion and Protection of Investment Act' will in terms of the 'SA Draft Arbitration Bill', article 5(1) be allowed and will be discerned from investor-state arbitrations.²⁰⁷ Fourthly, article 9 will extend immunity to arbitration institutions, arbitration service providers and arbitrators acting *bona fide*.²⁰⁸ Fifthly, article 11, arbitration which involves any public body should preferably be held in public, unless the arbitrator directs otherwise, but based on convincing motivation.²⁰⁹ The confidentiality of all private arbitration proceedings will however be determined in the arbitration agreement between

²⁰⁰ SALC 'Project 94' *op cit s.p.*; Feris *et al.* 'A New Dawn on International Arbitration Law on the Horizon', *s.p.* at <<https://www.cliffedekkerhofmeyr.com/en/news/publications/2016/dispute/dispute-resolution-alert-6-may-a-new-dawn-of-international-arbitration-law-on-the-horizon.html>>, accessed 11 November 2016.

²⁰¹ Feris *et al. op cit. s.p.*

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit s.p.*; 'SA Arbitration Act 42 of 1965'.

²⁰⁵ 'SA Draft International Arbitration Bill', article 5; SALC 'Project 94' *op cit s.p.*; Feris *et al. op cit. s.p.*

²⁰⁶ UNCITRAL 'Model Law on ICA (1985/2006)' *op cit s.p.*; 'SA Draft International Arbitration Bill', article 3(a); Feris *et al. op cit. s.p.*

²⁰⁷ 'SA Promotion and Protection of Investment Act 22 of 2015'; 'SA Draft International Arbitration Bill', article 5(1); Feris *et al. op cit. s.p.*

²⁰⁸ 'SA Draft International Arbitration Bill', article 9; Feris *et al. op cit. s.p.*

²⁰⁹ 'SA Draft International Arbitration Bill', article 11; Feris *et al. op cit. s.p.*

the parties.²¹⁰ Sixthly, parties to an international arbitration agreement may refer their dispute to conciliation in terms of the 'UNCITRAL Conciliation Rules of 1980'.²¹¹ Seventhly, the 'SA Recognition and Enforcement of Foreign Arbitral Awards Act' will be replaced by the 'SA International Arbitration Bill', Chapter 3 which will implement the 'NY Convention'.²¹² Eighthly, the 'SA International Arbitration Bill', Chapter 3: 'Recognition and Enforcement of Foreign Arbitral Awards' will no longer require the approval of the SA Minister of Economic Affairs to enforce certain types of foreign arbitration awards as the 'SA Protection of Business Act 99 of 1978', article 1(1) requires.²¹³ Ninthly, in terms of the 'SA International Arbitration Bill', article 16(3) a foreign arbitration award will be made an order of court upon application, except in certain instances, such as when, according to article 18(1)(a)(i), the subject matter is not arbitrable in SA, or in terms of article 18(1)(a)(ii), when the enforcement is against public policy or is *mala fide*.²¹⁴ In terms of the 'SA International Arbitration Bill', article 18, a foreign party is no longer required to provide security for costs at the beginning of an arbitration proceeding.²¹⁵

Unfortunately no mention is made anywhere of, nor is any provision made for online arbitration.

4. CONCLUSION

It is obvious that a new and updated 'SA International Arbitration Act' is much needed for various reasons at this time in the country's history, ranging from improving the country's legislation, to attracting FDI.²¹⁶ SA is an economic centre of Africa and is well positioned to become an international arbitration venue for arbitration in the Southern Hemisphere, the Developing World, Africa and Sub-Saharan Africa.²¹⁷ It is hoped that the 'SA International Arbitration Act' will be implemented as soon as possible and, once this is done, that SA will gradually start taking the centre stage on the African continent when it comes to resolving arbitration disputes.²¹⁸

²¹⁰ Feris *et al. op cit. s.p.*

²¹¹ UNCITRAL 'Conciliation Rules (1980)', *s.p.* at

<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html>, accessed 16 June 2016; Feris *et al. op cit. s.p.*

²¹² UNCITRAL 'NY Convention (1958)' *op cit s.p.*; 'SA Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977'; 'SA Draft International Arbitration Bill', Chapter 3; SALC 'Project 94' *op cit s.p.*

²¹³ 'SA Protection of Business Act 99 of 1978', article 1(1); Feris *et al. op cit. s.p.*

²¹⁴ 'SA Draft International Arbitration Bill', article 15(3); article 18(1)(a)(i); article 18(1)(a)(ii); Feris *et al. op cit. s.p.*

²¹⁵ 'SA Draft International Arbitration Bill', article 18; Feris *et al. op cit. s.p.*

²¹⁶ Baker *op cit s.p.*

²¹⁷ Baker *op cit s.p.*

²¹⁸ *Ibid.*

Unfortunately no mention is made anywhere of, nor is any provision made for online arbitration in the 'SA International Arbitration Act'. Since the whole process to compile the 'SA International Arbitration Act' has been drawn out over decades, it is not anticipated that the SALC will make provision for online arbitration in the 'SA International Arbitration Act' at this point in time. It is therefore hoped that the SALC could in future compile an 'Online Arbitration Amendment Act' to amend the 'SA International Arbitration Act' once it has been promulgated, to make provision for the regulation of online arbitration in SA.

At least it seems as if SA has already started to take the lead ahead of other African countries to make sure that the resolution of domain name disputes are no longer expensive and time consuming.²¹⁹ SAIPL has emerged as leader in the fight to eliminate domain name cyber piracy in the .co.za domain by resolving abusive and offensive domain name registrations.²²⁰ The cases which have already been resolved so far indicate how effective SAIPL's OADR procedure is and that it is most desirable to follow this form of OADR to avoid expensive and time-consuming litigation.²²¹

From an international point of view, it is of tremendous importance that lingering negative perceptions of arbitration that exist in SA should be replaced with positive thinking on how modernisation of arbitration laws, and online arbitration specifically, can boost SA's international business image and economy.²²²

²¹⁹ Snail *et al. op cit s.p.*

²²⁰ *Ibid.*

²²¹ Butler 'A Tribute to Dick Christie' *Arbitrarily Speaking* (April 2010) 7.

²²² Wilske 'The Global Competition for the 'Best' Place of Arbitration for International Arbitrations' *Contemporary Asia Arbitration Journal* 1(2008)28.

CHAPTER 8:

CONCLUSION

1. INTRODUCTION

One of the main challenges for WG.III when they compiled the 'Technical Notes' was to find a nexus between resolving low-value e-commerce disputes as cost-efficiently as possible, but at the same time also adhering to the minimum due process requirements.²²³ Adherence to due process during online arbitration creates tension between the need for efficiency and fairness and the need to have the dispute resolved quickly.²²⁴ Due process is a double-edged sword; online arbitration requires the due process requirements to be reduced, because too many legal formalities is costly and time-consuming, while on the other hand, online arbitration requires due process requirements to be stricter to offset the might of the stronger party, which is normally the online merchant.

When WG.III compiles a legal framework especially for online arbitration, they should focus on devising an online arbitration proceeding which will guarantee adherence to minimum due process principles and standards and which will make use of a user-friendly online platform with built-in incentives to participate and resolve e-commerce disputes, which makes optimal use of IT's potential, and whose decisions will be legally valid and whose awards will be able to be easily enforced *extra-judicially* without having to resort to a national court to guarantee enforcement.²²⁵ Now that the 'Technical Notes' was agreed upon, the debate on OADR will probably shift away from a discourse on conflict of laws to the need for an effective online arbitration proceeding and the devising of a way in which awards can be easily enforced *extra-judicially* without involving national courts for the enforcement of awards.²²⁶

2. HOW THE 'TECHNICAL NOTES' SHOULD BE LEGALLY AND TECHNICALLY ADAPTED TO COMPOSE A MORE EFFECTIVE *LEX ELECTRONICA ARBITRALIS*

2.1. Recommendation of what requirements UNCITRAL will have to regulate when they revisit the 'Technical Notes'

When UNCITRAL decides to revisit the 'Technical Notes' or to compile a set of legal standards that is exclusively focused on online arbitration, it would

²²³ Rule *OADR for Businesses* 202.

²²⁴ *Ibid.*

²²⁵ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 410.

²²⁶ *Ibid.*

have to focus on the further regulation of the following legal requirements: (1) the OADR procedure; (2) the global OADR framework, with a focus on both the relevant roleplayers and the components of such a framework; (3) the relevant legal principles; (4) the design of OADR proceedings; (5) the regulation of neutral third parties; (6) the finer points in the OADR proceeding; (7) the enforcement of decisions.

UNCITRAL would also have to focus on the regulation of the following technical requirements: (1) the certification of service providers; (2) incentives for users; (3) the relationship between the OADR service provider and the ODR platform, as well as (4) a technical enforcement protocol.

The basic features of each one of these aspects will be evaluated here so as to make some constructive proposals on how they can be improved and how online arbitration should be accommodated.²²⁷

2.2. Suggestions for further legal regulation

The following seven aspects pertain to further legal regulation that is required.

2.2.1. The OADR Procedure

It is important that the 'Technical Notes' contains the 'Two-Track' approach that it currently follows. This enables the 'Technical Notes' to accommodate jurisdictions in which agreements to arbitrate that were concluded prior to a dispute are deemed to be legally binding on consumers, as well as jurisdictions where pre-dispute arbitration agreements are not deemed to be legally binding on consumers.²²⁸

Countries whose laws render pre-dispute arbitration agreements not binding on online buyers will otherwise present a big problem because the inclusion of a mandatory arbitration phase in the 'Technical Notes' will be legally challenged in legal jurisdictions where such agreements are not deemed to be legally binding – as a result it is important that online arbitration should be optional during the Final Phase of the 'Technical Notes', but not mandatory.²²⁹ This will then allow a party from a jurisdiction where pre-dispute arbitration agreements are not deemed to be legally binding on consumers to submit to a 'second-click' post-dispute arbitration agreement in order to proceed to an arbitration phase.²³⁰

The 'Technical Notes' contains a two/three phase process which begins with the 'Negotiation Phase'; if the parties are then unable to reach an

²²⁷ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section III.

²²⁸ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.14; par.15.

²²⁹ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.14.

²³⁰ *Ibid.*

agreement, they may partake in an optional Facilitated Settlement Phase; and if that fails, the dispute may get diverted to a Final Phase which may comprise binding online arbitration.²³¹ UNCITRAL should compile a set of rules specifically for online arbitration, should parties opt for this option during the Final Phase of an ODR process.

This section will lay out how each phase can be improved to accommodate online arbitration even further.²³²

2.2.1.1. Suggestions pertaining to the Negotiation Phase

The suggestion of the use of standard forms pertains to the Negotiation Phase.

2.2.1.1.1. The Use of Standard Forms

In terms of the 'Technical Notes', Section VI, article 34, the OADR process will begin once the claimant e-files the online claim, which may, in terms of article 33(d), also include a proposed resolution.²³³

This phase of the OADR process will likely be highly automated and software will help the parties to resolve their dispute.²³⁴ Software-facilitated negotiation makes use of standard forms which the ODR Platform gives to the parties and which they will then use to negotiate.²³⁵ In terms of article 29, the ODR Platform can facilitate communication by, for example, contacting the other party, but may also assist by clarifying, exchanging, generating, identifying, processing, receiving, sending and storing important information.²³⁶

In order for software-facilitated negotiation to be effective OADR service providers should regularly update the standard forms, and consider previous cases so that previous experiences may help devise better standard forms; and whether a given dispute has certain unique IT requirements.²³⁷ A standard form should be in a user's own language, it should be user-friendly and should leave room for unique disputes.²³⁸

²³¹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section III.

²³² *Ibid.*

²³³ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section VI, article 33(d); article 34, Choi *et al.* 'ODR', s.p.at <<http://www.odr.info.unece2003>>, accessed 20 October 2016.

²³⁴ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section VI, article 33(d); Choi *et al.* *op cit* s.p.

²³⁵ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* article 2.

²³⁶ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section V, article 29.

²³⁷ Rabinovich-Einy *op cit* 253.

²³⁸ *Ibid.*

OADR service providers should also design an ODR Platform in a way which automatically formalises any resolution which the parties have reached.²³⁹ The parties should then be informed that they may no longer seek the enforcement of other legal rights.²⁴⁰ It is contended that UNCITRAL should include this requirement in the 'Technical Notes'.²⁴¹

2.2.1.2. Suggestions pertaining to the Facilitated Settlement Phase

The suggestion of a limited timeframe pertains to the Facilitated Settlement Phase:

2.2.1.2.1. Limited Timeframe

In terms of the 'Technical Notes', Section VII, article 39, it is desirable that, if the Negotiation Phase does not result in a settlement within "a reasonable period of time", that the process proceed to the next phase.²⁴² No mention is made of what a "reasonable period of time" is.

The 'DPR', draft article 5(3) gave parties ten days to reach a negotiated agreement, but draft article 5(4) permitted parties to agree to extend this deadline by another ten days.²⁴³ The 'Technical Notes' should also require such a short time period due to the low value of the dispute and the need for a swift proceeding.²⁴⁴ A short deadline will induce parties to resolve the dispute by negotiation.²⁴⁵

UNCITRAL should remember that the time limit of the Negotiation Phase should be enough for the respondent to decide whether s/he accepts the solution or whether s/he wants to propose an alternative solution, and for the claimant to devise the alternative proposal.²⁴⁶ Short deadlines could undermine the principle of fairness. In terms of the 'DPR', draft article 9(2)(c), pressure deriving from insufficient time would have prevented the parties from negotiating and/or accepting the most mutually beneficial proposed resolution.²⁴⁷

If the respondent would have admitted the claim, the 'DPR', draft article 5 stated that the negotiation, as well as the OADR proceedings, would have been concluded.²⁴⁸

²³⁹ Rabinovich-Einy *op cit* 253.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* Annexure A, section VII, article 39.

²⁴³ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* draft article 5(3), draft article 5(4).

²⁴⁴ Lodder *et al.* *Enhanced Dispute Resolution Through the Use of IT* 21.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* draft article 9(2)(c).

²⁴⁸ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* draft article 5.

In the event that the respondent did not answer to the notice, the ‘DPR’, draft article 5(2) stated that it would then have been presumed that the chance for negotiation was declined and the dispute would then have automatically been diverted to the optional settlement negotiation phase and thereafter the online arbitration phase.²⁴⁹ These aspects should be added to the ‘Technical Notes’.

2.2.1.3. Suggestions pertaining to the Final Phase

The third phase which the ‘Technical Notes’, Section IX, article 45 sets out is the ‘Final Phase’.²⁵⁰ This article states that if the neutral third party has not succeeded in facilitating the settlement, it is desirable that the neutral third party informs the parties of the nature of the Final Phase, and of the form that it might take.²⁵¹ It does not mention online arbitration by name.²⁵²

2.2.1.3.1. Low-Value OADR Paradigms

The ‘Technical Notes’, Section I, s.v. ‘Purpose of the Technical Notes’, article 5 states that the ‘Technical Notes’ is intended to be used in disputes arising from cross-border, low-value, sales or service agreements concluded by using online communications.²⁵³ Unfortunately no definition is given of what constitutes a ‘low-value’ sales or service agreement. UNCITRAL would have to look at this in future.

In accordance with WG.III’s decision at their 24th Session, the ‘DPR’ would deliberately not have included definitions of both the terms ‘low-value’ and ‘cross-border’.²⁵⁴

During WG.III’s 25th Session it was decided that the definition of ‘low-value’ could be dealt with in a commentary or other additional document.²⁵⁵

In the mean time, the key question is still unanswered, namely what are “low-value” e-commerce disputes?²⁵⁶ The problem with the concept is that ‘low-value’ calls for an entirely subjective evaluation relative to the wealth and priorities of the claimant.²⁵⁷

In this respect, Cressman *et al.* is of the opinion that WG.III should use a general, practical term, such as all ‘money back guaranteed’ e-commerce transactions, instead of a numeric, supposed low-value monetary description,

²⁴⁹ WG.III ‘DPR (A/CN.9/WG.III/WP.133)’ *op cit* draft article 5(2).

²⁵⁰ UNCITRAL ‘Report of 49th Session (A/70/17)’ *op cit* Annexure A, section IX, article 45.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ UNCITRAL ‘Report of 49th Session (A/70/17)’ *op cit* Annexure A, section I s.v. ‘Purpose of the Technical Notes’, article 5.

²⁵⁴ WG.III ‘Report of 24th Session (A/CN.9/739)’ *op cit* par.16.

²⁵⁵ WG.III ‘DPR (25th Session, A/CN.9/WG.III/WP.112)’ *op cit* par.9.

²⁵⁶ Hodges *et al.* *Resolving Mass Disputes* 299.

²⁵⁷ *Ibid.*

such as US\$100, as they are of the opinion that as soon as WG.III would start coupling numeric or monetary values with e-commerce disputes, it would eventually lead to a focus on high-value disputes, instead of the core-focus which should be low-value e-commerce disputes.²⁵⁸ Since US\$100 may be considered a high-value dispute in a developing world country, but not in a developed world country, they say that the institution of a monetary ceiling is impractical.²⁵⁹

2.2.1.3.2. Need to take Cognisance of all Relevant Mandatory Legal Provisions

The 'Technical Notes' will have to look at the requirement that an arbitration agreement has to be in writing, the requirement that an arbitration agreement needs to be authentically signed by the parties, as well as the requirement of original documentation and the presentation of actual evidence.

The 'Technical Notes' makes no mention of the need for a neutral third party to adhere to all relevant legal provisions, and in particular mandatory consumer legislation.²⁶⁰ This is something that UNCITRAL would have to look at in future.

2.2.1.3.3. e-Evidence

Another limitation of the 'Technical Notes' is that it does not regulate the online evaluation of e-evidence.²⁶¹

Each party will have to prove their claims and defences, but the *onus probandi* will however be more onerous on the consumer-claimant who may not always have the required financial or legal means or technical know-how to challenge the technical evidence that the online merchant-defendant presents.²⁶²

Also, online arbitrators may reach a different finding if s/he unravels a pattern of fraudulent activity.²⁶³ The 'Technical Notes' would have to provide clear directions to deal with such difficult situations.²⁶⁴

²⁵⁸ Cressman *et al.* 'Lessons and Best Practices', s.p. at <<http://www.colinrule.com/writing/ebaydd.pdf>>, accessed 25 August 2016.

²⁵⁹ *Ibid.*

²⁶⁰ EU Commission 'e-Justice Portal Online Filing System for the European Small Claims Procedure', s.p. at <https://e-justice.europa.eu/content_small_claims-42-en.do>, accessed 20 October 2016; Hodges *et al.* 'Litigation Funding: Status and Issues', s.p. at <<http://www.csls.ox.ac.uk/documents/ReportonLitigationFunding.pdf>>, accessed 20 October 2016.

²⁶¹ Cortés 'Does the Proposed European Procedure Enhance the Resolution of Small Claims?' *op cit* 83-97.

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ *Ibid.*

2.2.1.3.4. Required Legal Skills of a Neutral Third Party

The 'Technical Notes' does not require that the neutral third party should be a qualified lawyer.²⁶⁵

In this regard, WG.III decided at its 31st Session that it would have been sufficient for a neutral third party to have at least obtained some relevant skills in dispute resolution.²⁶⁶ The relevant skills of neutral third parties are however very important as they will be determining legal entitlements and their decisions will have to respect the law, especially when they issue arbitration awards which will have to comply with the 'NY Convention of 1958'.²⁶⁷ In addition, the decisions and awards made by neutral third parties, as well as the processes which they have followed to derive at such decisions and awards, will have to be monitored regularly by independent accreditation agencies.

2.2.1.3.5. Same or Different Neutral Third Party for the Facilitated Settlement Phase and Final Phase?

The 'Technical Notes' sets no rules that determine whether the neutral third party that was involved at the 'Facilitated Settlement Phase' may also chair the 'Final Phase'.

The 'Technical Notes' deviates from the 'Model Law on International Commercial Conciliation of 2002', article 12 by saying nothing in this regard, and thereby in effect allowing the same neutral third party, who was involved in the Facilitated Settlement Phase to be also be involved in the Final Phase which may involve online arbitration.²⁶⁸ In an attempt to ensure a sober second look at a dispute, an arbitration proceeding needs to be performed impartially. The custom in traditional arbitration is for the arbitrator to be a different person than the conciliator or mediator.²⁶⁹ However, when two different neutral third parties are required, it will only increase expenses and call for more time, as the arbitrator would then have to examine the same dispute from the beginning.²⁷⁰ Since the 'Technical Notes' is focused on the resolution of low-value e-commerce disputes, it is contended that it may be justifiable to deviate from the traditional arbitration approach as simplicity and swiftness, are important.²⁷¹ A

²⁶⁵ Cortés 'Does the Proposed European Procedure Enhance the Resolution of Small Claims?' *op cit* 83-97.

²⁶⁶ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* par.63.

²⁶⁷ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 417.

²⁶⁸ WG.III 'DPR (31st Session–A/CN.9/WG.III/WP.133)' *op cit* draft article 7; UNCITRAL 'Model Law on International Commercial Conciliation (2002)', article 12 at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html, accessed 20 October 2016.

²⁶⁹ Menkel-Meadow 'Are There Systematic Ethic Issues in Dispute System Design?' *Harvard Negotiation LR* 14(Winter 2009) 202.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

possible solution could be to allow the parties to request a different neutral third party for the Final Phase whenever online arbitration is involved. However, since this would increase the cost of the proceeding, the applicant should then be required to pay an additional fee.²⁷²

2.2.1.3.6. No Provision for a Party to Reject a Neutral Third Party

The 'Technical Notes' has no provisions on the possibility for parties to reject a neutral third party.

The 'DPR', draft article 6(3), stated that once the neutral third party was appointed, the parties would have had two days within which they were allowed to disqualify him/her, and that each party could then have rejected different neutral third parties three times, without being required to give reasons.²⁷³

The 'UNCITRAL Arbitration Rules of 2010', article 6.7 states that when a neutral third party needs to be appointed, the online arbitration service provider should preferably appoint a neutral third party from of a different country than the ones where the parties are from.²⁷⁴ This may be impractical as e-commerce, and as a result, potential neutral third parties, are distributed unequally across the globe. Most parties as well as potential neutral third parties, will at this point in time still be citizens of either the USA or the EU, making the pool to choose from, very small.²⁷⁵ In either way, UNCITRAL should look at away to prevent the same neutral third party from being continually allocated to disputes from the same online merchants.²⁷⁶ In addition, UNCITRAL should also require procedural disclosures and accreditation mechanisms in order to maximise transparency and to lessen the potential for forum-shopping and conflict of interests.²⁷⁷

2.2.1.3.7. The Distribution of Arbitration Costs

WG.III could not reach consensus on the financial burden associated with the online arbitration proceeding.²⁷⁸

During WG.III's 22nd Session, two proposals were made in this regard: firstly, to distribute arbitration costs among all users of the OADR system. Secondly, to place the entire financial burden on the online merchants who uses the OADR system.²⁷⁹ During this Session, the first option was rejected because

²⁷² Menkel-Meadow *op cit* 202.

²⁷³ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* draft article 8(1); draft article 6.

²⁷⁴ UNCITRAL 'Arbitration Rules of 1976/2010', article 6.7, available at <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>, accessed 20 October 2016.

²⁷⁵ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 419.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ Souissi 'ODR in International Electronic Operations' *op cit* 1.

²⁷⁹ WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.110.

it was felt that an additional financial burden would discourage online buyers from buying online.²⁸⁰ At the same time, it was felt that although the second option takes cognisance of the asymmetry of the online buyers' and online merchants' financial means, this option was also challenging as it could possibly cast aspersions on the objectivity and neutrality of online arbitration service providers.²⁸¹ It was rightly felt that to let online merchants bear all of the expenses and to then let parties depend on the objectivity and neutrality of such an OADR mechanism would lead to a conflict of interests and lead to possible market abuse.²⁸²

Only an OADR mechanism which is entirely private or based on public funding will dismiss any fears about real or perceived prejudice on the part of OADR service providers and will be able to ensure the integrity of the proceeding, and also greater access to justice.²⁸³

2.2.1.3.8. Room for Corrections of Errors

The 'Technical Notes' sets no room for the correction of possible errors made by the neutral third party.

The 'DPR', draft article 7 *bis* made provision for five days during which parties may have requested the neutral third party to correct any clerical, computative, omission or typographical error.²⁸⁴ According to the same draft article, the neutral third party may have made corrections within two days after s/he had received the request.²⁸⁵

2.2.1.3.9. Need for an Independent Monitoring System

Two of the most important limitations of arbitration are the lack of precedents and a lack of transparency since awards are confidential, which have the consequence that exploitation and maltreatment may go unnoticed if it is not monitored.²⁸⁶ An independent monitoring mechanism could publish information on arbitration awards, and accredit service providers and consumer protection institutions.²⁸⁷

2.2.1.3.10. Access to Information of First Two Phases

²⁸⁰ WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.108.

²⁸¹ WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.112.

²⁸² WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.110.

²⁸³ Souissi 'ODR in International Electronic Operations' *op cit* 4.

²⁸⁴ WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* draft article 7 *bis*.

²⁸⁵ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 420.

²⁸⁶ Schmitz "Drive-Thru' Arbitration in the Digital Age' *op cit* 178-244.

²⁸⁷ *Ibid.*

The 'Technical Notes' has no provisions on a neutral third party's access to information that the parties submitted during the Online Negotiation Phase or the Facilitated Settlement Phase.²⁸⁸

In this regard, UNCITRAL could opt to take the route which the 'EU ECODIR', article 3, s. v. 'The Mediation Phase', s. v. 2 followed, by allowing the neutral third party full access to the records of the Negotiation Phase and the Facilitated Settlement Phase. Otherwise they could opt to limit access to respect the confidentiality of these two phases.²⁸⁹ The latter approach conforms to the traditional judicial and arbitration procedural approach which requires the total confidentiality of any preceding phases.²⁹⁰ Since the 'Technical Notes' is focused on the swift resolution of disputes, the confidentiality of the preceding phases should not be too important. Should UNCITRAL however opt for the traditional approach, the parties should be informed beforehand on the degree of confidentiality of the Negotiation Phase and the Facilitated Settlement Phase before they begin to participate in these two phases.²⁹¹

2.2.1.3.11. Requirement for OADR Agreement in Writing

The 'Technical Notes' will have to look at the requirement that an OADR agreement has to be in writing, in order for online documentation to also be deemed to be legally valid.

2.2.1.3.12. Requirement that an OADR Agreement Needs to be Authentically Signed by Parties

The 'Technical Notes' will have to look at the requirement that an OADR agreement needs to be authentically signed by the parties.

2.2.2. The Global OADR Framework: Roleplayers and Components

When UNCITRAL revisits the 'Technical Notes', they would also have to look at the Global OADR framework, and have regard at its roleplayers and components.

2.2.2.1 Global OADR Framework

There are still a few uncertainties on how exactly the international online arbitration framework will function:

²⁸⁸ Eaton 'Mandatory Mediation and Summary Jury Trial' *Harvard LR*103 (1990) 1086.

²⁸⁹ ECODIR 'ECODIR Resolution Rules', article 3, s.v. 'The Mediation Phase, s.v.at <<http://www.ecodir.org/odrp/rules.htm>>, accessed 20 October 2016; Eaton *op cit* 1086.

²⁹⁰ Eaton *op cit* 1086.

²⁹¹ *Ibid.*

2.2.2.2. Design of Global OADR

The main actors in the global OADR framework that the 'Technical Notes' identified so far are the OADR service providers, the ODR Platform, users of OADR and neutral third parties.²⁹² The 'Technical Notes' however makes no mention of the implementers of OADR decisions.²⁹³ UNCITRAL may wish to consider whether any other actor should be added and also consider the relationship between them and the other actors.²⁹⁴

It should be determined whether there would be one single global OADR service provider, or several operating at an international, regional or domestic level?²⁹⁵ Once that matter is determined, the following questions should be considered: in the case of a single global OADR service provider, would that service provider manage one or more ODR Platforms?²⁹⁶ If several OADR service providers are envisaged, would each manage their own ODR Platform, or could a provider use the services of an ODR Platform managed by another service provider? In the latter case, how can interoperability be ensured?²⁹⁷ Again, in the case of several OADR service providers, will users be able to choose which one they use? If so, on what basis?²⁹⁸ And how are uniform standards of operation among OADR service providers to be maintained?

Will the global OADR framework operate in relation to a single, centralised ODR platform, or will there be several?²⁹⁹

2.2.2.3. Components of the OADR Framework

In accordance with the decisions of WG.III at its 23rd Session, the OADR framework is envisaged to consist of a set of legal standards as well as a separate document that complements the set of legal standards.³⁰⁰ The 'Technical Notes' regulate how OADR proceedings are commenced, conducted and terminated; the latter fills in the details.

Such an anticipated separate document to the 'Technical Notes' could be in the form of guidelines for OADR service providers and other actors.³⁰¹ It should deal with aspects not included in the 'Technical Notes', such as costs,

²⁹² UNCITRAL 'Issues for Consideration in the Conception of a Global ODR Framework (24th Session, 14 – 18 November 2011, Vienna A/CN.9/WG.III/WP.110)', par. 4(a) at <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V11/859/64/PDF/V1185964.pdf?OpenElement>>, accessed 1 December 2016.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.4(c).

²⁹⁶ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.4(c)(i).

²⁹⁷ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.4(c)(ii).

²⁹⁸ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.4(c)(iii).

²⁹⁹ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.4(d).

³⁰⁰ WG.III 'Report of 33rd Session (A/CN.9/868)' *op cit* section IV.

³⁰¹ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.4(d).

definition of calendar days, the challenging of neutral third parties as well as a code of conduct and minimum requirements for neutral third parties.³⁰²

UNCITRAL would also have to compile guidelines for the rendering of decisions and implementation of online arbitration awards.³⁰³ Substantive legal principles for resolving disputes may refer to general principles on which neutral third parties could base their decisions.³⁰⁴ A cross-border enforcement mechanism would ensure the implementation of any decision or settlement.³⁰⁵

Other relevant documents, such as those dealing with accreditation of OADR service providers, operational standards for OADR service providers, functional requirements for an ODR Platform, technical specifications for an ODR Platform, interoperability standards of ODR Platforms and other related matters may be better dealt with at the domestic or regional level where the OADR framework is established.³⁰⁶

2.2.3. Relevant Principles

UNCITRAL should refer to WG.III's earlier considerations on relevant principles on confidentiality, processing and transfer of information, data security, and archiving and on the responsibilities of the ODR Platform and OADR service provider for procedural issues including accountability, due process, fairness, neutral appointment or selection, transparency, and the performance capabilities of the ODR Platform, because these should be included in the 'Technical Notes'.³⁰⁷

2.2.4. Design of OADR Proceedings

The 'Technical Notes' provides for different phases in the resolution of a dispute, namely, the Negotiation Phase and the Facilitated Settlement Phase, which form part of the consensual phase; followed by a Final Phase, which allows a neutral third party to issue a binding decision.³⁰⁸

Several questions arise with respect to the design of OADR proceedings: should a claimant have the option to enter the OADR process at a phase of his choosing and, if so, at what point should s/he make that choice?³⁰⁹ Should an OADR service provider be allowed to offer services for only certain phases of

³⁰² UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.4(d).

³⁰³ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.6.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.7.

³⁰⁷ WG.III 'Notes on a Non-Binding Descriptive Document (A/CN.9/WG.III/WP.137)', par. 42(c) at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V15/071/48/PDF/V1507148.pdf?OpenElement>, accessed 23 August 2016.

³⁰⁸ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.9.

³⁰⁹ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.12(b).

the proceedings, which are referred to as ‘cherry-picking’?³¹⁰ Should the Negotiation Phase include more specific types of negotiation, such as an Automated Negotiation Phase and/or an Assisted Negotiation Phase?³¹¹ If one party refuses to take part in the Negotiation Phase, at what point can the other party force a move to the Facilitated Settlement Phase?³¹²

2.2.5. The Regulation of OADR Neutral Third Parties

Several questions arise as to the selection of neutral third parties, namely, how will neutral third parties be selected?³¹³ How will neutral third parties be accredited?³¹⁴ Should there be a limit on their period of service, or the renewal thereof?³¹⁵ Who will be tasked with the accreditation process?³¹⁶ Can the parties challenge the appointment of a neutral third party?³¹⁷ On what basis could such challenges be rejected?³¹⁸ Will the list of neutral third parties be a global one maintained by a single OADR service provider, or would there be several lists maintained by various service providers?³¹⁹ If a global list, who will have the authority to amend, add, or disqualify neutral third parties on the list?³²⁰

There are also questions related to the authority of neutral third parties: could a neutral third party preside over a case at both the Facilitated Settlement Phase and at the Final Phase?³²¹ If the language of the proceedings is to be decided by the neutral third party, what should be the guidelines?³²² If extension of time is allowed for the neutral third party to make a decision, what will ensure that they will render their decision in a timely manner?³²³

2.2.6. Finer Points in the Proceeding

UNCITRAL may also wish to address more detailed points of the OADR procedure: whether the OADR service provider could provide parties with an overview of the OADR process, including neutral third party selection, the order and progression of the process and costs; whether the location of the claimant could be included in the claimant’s notice; whether the respondent’s response could include the location of the respondent, notice of any counterclaim and the

³¹⁰ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.12(c).

³¹¹ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.12(d).

³¹² UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.12(f).

³¹³ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.17(a).

³¹⁴ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.17(b).

³¹⁵ *Ibid.*

³¹⁶ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.17(c).

³¹⁷ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.17(d).

³¹⁸ *Ibid.*

³¹⁹ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.17(e).

³²⁰ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.17(f).

³²¹ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.18(a).

³²² UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.18(b).

³²³ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.18(c).

supporting evidence therefor, and whether the respondent agrees with the language of proceedings provided by the claimant. Also, whether another language is preferred? WG.III may also wish to consider questions of supporting evidence, and procedures for appointment of the neutral third party and challenge procedures.³²⁴

2.2.7. The Enforcement of Decisions

UNCITRAL still needs to pay a lot of attention to the way in which decisions should be enforced.

2.2.7.1. Cross-Border Enforcement

Enforcement in the context of OADR concerns two matters: firstly, enforcement of settlement agreements reached by the parties through online negotiation or mediation. Secondly, enforcement under the 'NY Convention' of OADR arbitration decisions.³²⁵ As one of the benefits of OADR is to avoid lengthy and expensive procedures in a national court of a foreign jurisdiction, it may prove useful to avoid court enforcement by exploring other mechanisms to encourage self-compliance.³²⁶ What follows is a short analysis on enforcement issues that WG.III should look at in future:

2.2.7.1.1. Enforcement of OADR Settlement Agreements under the 'UN NY Convention of 1958'

Fast and easy enforcement of Facilitated Settlement Phase agreements should be promoted.³²⁷ The methods for achieving such expedited enforcement vary however greatly between legal systems and are dependent upon the technicalities of national procedural law, which do not easily lend themselves to harmonisation.³²⁸

The 'Model Law on Conciliation of 2002', article 14 leaves issues of enforcement, defences to enforcement and designation of courts (or other authorities from whom enforcement of a settlement agreement might be sought) to applicable national law or to provisions to be formulated in the legislation enacting the 'Model Law on Conciliation of 2002'.³²⁹ The attractiveness of conciliation would however be increased if a settlement reached during a

³²⁴ WG.III 'Notes on a Non-Binding Descriptive Document (A/CN.9/WG.III/WP.137)' *op cit* par.43.

³²⁵ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.20.

³²⁶ *Ibid.*

³²⁷ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.20.

³²⁸ *Ibid.*

³²⁹ UNCITRAL 'Model Law on Conciliation (2002)', article 21 at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html, accessed 1 December 2016.

conciliation would enjoy a regime of expedited enforcement or would, for the purposes of enforcement, be treated as or similarly to an arbitration award.³³⁰

2.2.7.1.2. Enforcement of OADR Arbitration Decisions

At WG.III's 22nd Session it was generally agreed that OADR arbitration decisions should be final and binding, with no appeals on the substance of the dispute, and carried out within a short time period after being rendered.³³¹

At its 23rd Session, WG.III engaged in an initial discussion of the appropriateness and applicability of the 'NY Convention' to OADR decisions.³³² UNCITRAL would have to take these discussions further in the future.

2.2.7.2.1 Functional Equivalence in terms of the 'NY Convention of 1958' and the 'UN Convention on the Use of Electronic Communications in International Agreements of 2007'

The 'NY Convention of 1958' provides common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitration awards.³³³ The 'Technical Notes' do not define the notion of an award.³³⁴ The form of an award is also not defined under the 'NY Convention' or the 'Technical Notes'.³³⁵

The 'UN Convention on the Use of Electronic Communications in International Agreements of 2007', article 9(3) adopts the functional equivalence principle by laying out criteria under which online communications may be considered equivalent to paper-based communications.³³⁶ In particular, it sets out the specific requirements that online communications need to meet in order to fulfil the same purposes and functions that certain notions in the traditional paper-based system - such as 'original', 'record', 'signed' and 'writing' - seek to achieve.³³⁷ These requirements and definitions should be included in the 'Technical Notes'.

The 'NY Convention', article II(2), deals with the form requirement for an arbitration agreement, and although it refers to the means of communication, it does not specifically include any reference to online documents.³³⁸ The 'UN Convention on the Use of Electronic Communications in International

³³⁰ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.22.

³³¹ WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.19.

³³² WG.III 'Report of 23rd Session (A/CN.9/721)' *op cit* par.18; par.19.

³³³ UNCITRAL 'NY Convention (1958)' *op cit* s.p.

³³⁴ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.25.

³³⁵ *Ibid.*

³³⁶ UN 'Convention on the Use of Electronic Communications in International Agreements (2007)', article 9(3) at <http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf>, accessed 1 December 2016.

³³⁷ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.26.

³³⁸ UNCITRAL 'NY Convention (1958)' *op cit* article II(2).

Agreements of 2007', article 20(1) clarifies that the provisions of that 'NY Convention' apply to the use of online communications in connection with the formation or performance of a agreement to which the 'NY Convention' applies.³³⁹ This 'Convention' states that an online document is functionally equivalent to a paper document and thus satisfies the need for writing, and shall, in terms of article 8(1) not be denied validity or enforceability, provided, in terms of article 9(2), it remains accessible for further reference.³⁴⁰ The 'Technical Notes' should look at these requirements.

2.2.7.3. Applicability of the 'NY Convention of 1958'

This section will look at the applicability of the 'NY Convention':

2.2.7.3.1. Applicability of the 'NY Convention of 1958', article VII

By virtue of the "more favourable law provision" contained in the 'NY Convention', article VII(1), "any interested party" should be allowed; "to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement".³⁴¹

At WG.III's 22nd Session it was noted that, should any OADR standard be developed under which a party with an arbitration award would be provided with a specific enforcement mechanism, then the 'NY Convention', article VII(1) might permit resort to such an enforcement mechanism and thus problems with enforcement through other provisions of the 'NY Convention' might be avoided.³⁴²

Courts, in many states, have established a clear position as to the circumstances in which the 'NY Convention', article VII(1) might be applied to uphold arbitration agreements where the form requirement set out in the 'NY Convention', article II(2) would otherwise not be met.³⁴³ The advantage of applying article VII(1) would be to avoid the application of article II(2) and, as states enacted more favourable provisions on the form requirement for

³³⁹ UNCITRAL 'NY Convention (1958)' *op cit* s.p.; UN 'Convention on the Use of Electronic Communications in International Agreements (2007)' *op cit* article 20(1).

³⁴⁰ UN 'Convention on the Use of Electronic Communications in International Agreements (2007)' *op cit* article 8(1); article 9(2).

³⁴¹ UNCITRAL 'NY Convention (1958)' *op cit* article VII(1); UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.35.

³⁴² UNCITRAL 'NY Convention (1958)' *op cit* article VII(1); WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.100; UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.36.

³⁴³ UNCITRAL 'NY Convention (1958)' *op cit* article II(2); article VII(1); UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.37.

arbitration agreements, article VII(1) would allow the development of rules favouring the validity of arbitration agreements in a wider variety of situations.³⁴⁴

Therefore, reliance on article VII(1) can, to some extent, be an effective solution to overcome the uncertainty regarding the enforceability of online arbitration provisions under article II(2) of the 'NY Convention'.³⁴⁵ Article VII(1) can also be used if a specific framework for enforcement of online awards is designed.³⁴⁶

It would be good if the 'Technical Notes' could address these aspects as well.

2.2.7.3.2. Applicability of the 'NY Convention of 1958', article IV

The 'NY Convention', article IV(1) requires either the original or certified copies of the arbitration award and of the arbitration agreement.³⁴⁷ The 'Convention on the Use of Electronic Communications in International Agreements', article 9(4) defines an original online document.³⁴⁸

In relation to signatures, when the law requires that a communication or an agreement should be signed by a party, the 'Convention on the Use of Electronic Communications in International Agreements', article 9(3) determines the situations in which this requirement is met.³⁴⁹

The 'NY Convention', article IV provides for the production of certified copies to ensure that the documents produced were drafted by their alleged authors (authenticity) and that the contents are those originally drafted by the authors (integrity of content).³⁵⁰

The non-fulfilment of the condition set forth in the 'NY Convention', article IV can be cured after the request for enforcement is filed. If the enforcement court requires paper copies, the party seeking enforcement should be able to obtain copies from the arbitrators.³⁵¹

The 'Technical Notes' would have to look at these aspects.

³⁴⁴ UNCITRAL 'NY Convention (1958)' *op cit* article II(2); article VII(1); UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.37.

³⁴⁵ UNCITRAL 'NY Convention (1958)' *op cit* article II(2); article VII(1); UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.38.

³⁴⁶ *Ibid.*

³⁴⁷ UNCITRAL 'NY Convention (1958)' *op cit* article IV(1).

³⁴⁸ UN 'Convention on the Use of Electronic Communications in International Agreements (2007)' *op cit* article 9(4); UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.39.

³⁴⁹ UN 'Convention on the Use of Electronic Communications in International Agreements (2007)' *op cit* article 9(3); UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.40.

³⁵⁰ UNCITRAL 'NY Convention (1958)' *op cit* article IV; UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.41.

³⁵¹ UNCITRAL 'NY Convention (1958)' *op cit* article IV; UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.42.

2.2.7.3.3. Applicability of the ‘NY Convention of 1958’, article V

The ‘NY Convention’, article V(1) allows the recognition and enforcement of an arbitration award to be refused, at the request of the party against whom it is invoked, if that party furnishes to the competent authority where the recognition and enforcement is sought, certain proof.³⁵²

This section will look at these aspects because the ‘Technical Notes’ will have to pay attention to these aspects.

2.2.7.3.3.1. Applicability of the ‘NY Convention of 1958’, article V(1)(a)

The ‘NY Convention’, article V(1)(a) evolves around an instance where the arbitration agreement is not valid.³⁵³ Article V(1)(a) states that the requirements of substantive validity of arbitration agreements are governed by; “the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.³⁵⁴ One of the main questions for consideration is whether there was consent to arbitration by the parties.³⁵⁵ That question is left to be dealt with by applicable domestic law, and online arbitration agreements may not necessarily raise specific issues.³⁵⁶ Regarding B2C agreements, the question is whether those arbitration agreements or pre-dispute arbitration agreements are recognised as valid under the applicable national laws.³⁵⁷ That question has received different responses depending on the particular jurisdiction, and there is no harmonised approach to the matter.³⁵⁸

2.2.7.3.3.2. Applicability of the ‘NY Convention of 1958’, article V(1)(e)

The ‘NY Convention’, article V(1)(e) evolves around an instance where the arbitration award is not yet binding.³⁵⁹

A question for consideration is whether the losing party may oppose enforcement on the grounds that the award is not binding because of its communication via online means, for example, because the losing party has not been informed of the award in the manner required by the ‘NY Convention’.³⁶⁰

³⁵² UNCITRAL ‘NY Convention (1958)’ *op cit* article V(1).

³⁵³ UNCITRAL ‘NY Convention (1958)’ *op cit* article V(1)(a).

³⁵⁴ UNCITRAL ‘NY Convention (1958)’ *op cit* article V(1)(a).

³⁵⁵ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.43.

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ UNCITRAL ‘NY Convention (1958)’ *op cit* article V(1)(e).

³⁶⁰ UNCITRAL ‘Issues for Consideration (A/CN.9/WG.III/WP.110)’ *op cit* par.44.

Even though the 'NY Convention' does not require a notification of the award, one could consider that the autonomous concept of a binding award requires notification.³⁶¹ Similarly, applicable national laws governing awards may well require notification for the award to acquire binding force.³⁶² The question is therefore to find solutions for ensuring and proving that the parties are notified of awards made online.³⁶³

2.3. Suggestions pertaining to Further Technical Regulation

The following seven aspects pertain to further technical regulation that is required.

2.3.1. The Certification of Service Providers

It is important that the online arbitration industry itself is regulated. Standards will have to be laid down for service providers, and the quality of their work will have to be monitored by means of an accreditation system.

2.3.1.1. Standards for OADR Service Providers

UNCITRAL would need to develop standards for OADR service providers and include these as an 'Addendum' to the 'Technical Notes'.³⁶⁴ The following section will look at what exactly needs to be done in this regard.

2.3.1.2. Quality Control over OADR Service Providers

Besides the principles on how e-commerce disputes should be resolved, and the enforcement protocol, the compilation of guidelines that will set minimum requirements for OADR service providers and neutral third parties on how to conduct an OADR proceeding, is an important matter.³⁶⁵ In order for the 'Technical Notes' to function effectively, it will need to be linked to an accreditation system.³⁶⁶ This part will look at, firstly, the importance of an accreditation system. Secondly, the importance of the self-enforcement of final outcomes. Thirdly, the different types of accreditation structures that are

³⁶¹ UNCITRAL '*Issues for Consideration (A/CN.9/WG.III/WP.110)*' *op cit* par.44.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

possible. Lastly, a recommendation will be made for a trustmark to recognise accredited OADR service providers.³⁶⁷

2.3.1.2.1. The Importance of an Accreditation System

An accreditation system is important because it will ensure that OADR service providers and the processes that they follow adhere to the guidelines that the 'Technical Notes' sets out.³⁶⁸ It will also provide uniform universal principles and standards for online arbitration and ensure quality online arbitration procedures and systems.³⁶⁹ An accreditation body should only accredit OADR service providers who adhere to a high degree of due process and transparency standards, principles and procedures, and which for instance publishes information on decisions reached on model cases and other summative information of decisions which have been reached.³⁷⁰

UNCITRAL would have to ensure that the procedural standards of the 'Technical Notes' relate to the independence of OADR service providers, the impartiality of neutral third parties, the transparency of the OADR process and the effective implementation of agreements, decisions and awards.³⁷¹

OADR service providers should not be left to comply with the procedural standards that are set out themselves. Accreditation bodies would need to pro-actively and regularly check the OADR service providers' and neutral third parties' compliance and see whether they still adhere to the procedural standards. If they don't, they should then be able to forfeit their accreditation.³⁷²

When UNCITRAL decides to compile the guidelines for an accreditation system, they should also consider establishing a complaints system that parties may use as soon as OADR service providers and neutral third parties don't adhere to the 'Technical Notes'.³⁷³

2.3.1.2.2. The Need for Self-Enforcement of Online Arbitration Agreements, Outcomes and Awards

An enforcement protocol for online arbitration agreements, outcomes and awards will still have to be compiled.³⁷⁴ Such a protocol would need to have a strong focus on private and automatic enforcement mechanisms, in order to lessen the potential for expensive and unnecessary court enforcement that

³⁶⁷ UNCITRAL '*Issues for Consideration (A/CN.9/WG.III/WP.110)*' *op cit* par.44.

³⁶⁸ Cortés, 'Developing ODR for Consumers in the EU' *op cit* 1-28.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ Rabinovich-Einyop *cit* 253.

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 431.

would take online arbitration back to square one.³⁷⁵ Online arbitration agreements, decisions and awards will be best enforced if accredited OADR service providers could make use of private enforcement mechanisms in association with payment providers.³⁷⁶ The assistance of payment providers will prove to be especially helpful with the implementation of resolutions when parties have contractually agreed to take part in online arbitration.³⁷⁷ It is contended that an association with existing payment service providers (PSP's), such as American Express, Diners Club, Mastercard, PayPal or Visa, would be best, instead of going to all the trouble to create new intermediaries.³⁷⁸

If e-commerce disputes could be outsourced to accredited OADR service providers, PSP's could still be able to preserve their neutral stance, while they simultaneously perform the role as medium for payment and the enforcer of an online arbitration outcome and/or award.³⁷⁹ An enforcement system would be most successful once a payment intermediary could acquire access to the accounts of both parties.³⁸⁰

UNCITRAL should also think of creative ways to devise incentives to promote the voluntary compliance with an online arbitration agreement, outcome, decision and/or award, and as set out previously, these incentives may range from blacklisting of both parties, to passing the information on the outcome of an online arbitration proceeding to the public authority in the country of the respondent, to the publication of negative reviews of parties, to the revocation of an online merchant's trustmark, whenever a party fails to adhere to an online arbitration agreement, decision and/or award.³⁸¹

In terms of the 'DPR', draft article 7(7), an award would have been final and binding on the parties, and draft article 7 *bis* only made provision for the correction of an online arbitration award in a few instances, while draft article 7 *ter* made provision for the internal review mechanism.³⁸² UNCITRAL should however still allow online buyers to institute class actions in courts or to institute legal action in the event that mandatory legislation of their country of residence or elsewhere has not been adhered to during the online arbitration proceeding.

It is important that UNCITRAL should start thinking about devising incentives for the self-enforcement of OADR outcomes, because it is impossible to expect that national courts or accreditation bodies must monitor adherence in every case as they do not have the global reach, resources or time to so. This will have to be done by OADR service providers and neutral third parties

³⁷⁵ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 431.

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

³⁷⁸ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 432.

³⁷⁹ Del Duca *et al.* 'Designing a Global Consumer ODR System' *op cit* 221.

³⁸⁰ *Ibid.*

³⁸¹ *Ibid.*

³⁸² WG.III 'DPR (A/CN.9/WG.III/WP.133)' *op cit* draft article 7(7); draft article 7 *bis*; draft article 7 *ter*.

themselves, and they will have to be monitored and evaluated frequently by independent accreditation bodies to ensure that transparent OADR processes are followed and to collect and publish data on decisions that were taken.³⁸³

2.3.1.2.3. Models of Accreditation Agencies

UNCITRAL will have to give proper thought on who would be best-suited to conduct the accreditation of OADR service providers.³⁸⁴ Accreditation may well be conducted at either the national, regional or global level, but then these efforts would have to be coordinated in a proper fashion.³⁸⁵ It is not necessarily a prerequisite for accreditation bodies to be public entities, the main requirement is just that they should be independent.³⁸⁶

Various ADR/OADR accreditation models already exist, and in the EU, the Network of the ECC-Net and the European Commission publishes the names of OADR service providers that each EU member states' ECC national centre has approved.³⁸⁷ The OADR service providers whose names are published have in addition also given their undertaking that they will adhere to the 'EU ADR Directive' and the 'EU Regulation on OADR' - although an undertaking is better than nothing, it is nevertheless still a weak form of regulation.³⁸⁸

In the USA for instance, ABA's 'Section of Dispute Resolution', was tasked by ABA to compile guidelines on how to develop ethical OADR systems, and in this regard they have already published the 'Code of Ethics for Arbitrators in E-Commerce Disputes Policy Document of 2002' and also the 'Code of Ethics Model Rules and Standards for Commercial Arbitrators of 2004'.³⁸⁹

³⁸³ Del Duca *et al.* 'Designing a Global Consumer ODR System' *UCC LJ op cit* 221.

³⁸⁴ Bornstein 'Accreditation of ODR Practitioners' *Conflict Resolution Quarterly* 23 (2006) 383.

³⁸⁵ *Ibid.*

³⁸⁶ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 433.

³⁸⁷ EU Commission 'EU Trusted Lists', *s.p.* at <<https://ec.europa.eu/digital-single-market/en/eu-trusted-lists-trust-service-providers>>, accessed 20 October 2016; ECC-Net 'Help and Advice for Consumers in Europe', *s.p.* at <http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/ecc-net/index_en.htm>, accessed 20 October 2016.

³⁸⁸ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit s.p.*; EU Commission 'Regulation on OADR (2013)' *op cit s.p.*; Cortés, De la Rosa 'Building a Global Redress System' *op cit* 433.

³⁸⁹ ABA 'Policy and Standards', *s.p.* at <http://www.americanbar.org/groups/dispute_resolution/policy_standards.html>, accessed 20 October 2016; ABA 'Code of Ethics for Arbitrators in E-Commerce Disputes Policy Document (2002)', *s.p.* at <http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/commercial_disputes.authcheckdam.pdf>, accessed 20 October 2016; ABA 'Code of Ethics Model Rules and Standards for Commercial Arbitrators (2004)', *s.p.* at <http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/commercial_disputes.authcheckdam.pdf>, accessed 20 October 2016.

In the UK, the Chartered Institute of Arbitrators (CI Arb) has developed the 'Guidelines and Ethics' standards to certify the competency of arbitrators.³⁹⁰

However, at this point in time, there is still no global accreditation institution for online arbitration.³⁹¹ It is contended that a good starting point for UNCITRAL in this regard would be to fund a not-for-profit accreditation institution that would be able to manage all existing national and regional accreditation bodies and to help establish accreditation bodies where there still aren't any.³⁹² All accreditation bodies should adhere to a similar set of principles, procedures and standards; in other words all accreditation bodies should strive towards the equivalence principle.³⁹³ In the interim, already existing accreditation bodies should continue with their work, but that they all should eventually be required to sign a multilateral agreement with the not-for-profit accreditation institution that UNCITRAL should ideally establish in the future.³⁹⁴

Another workable possibility which UNCITRAL could maybe also think about is to follow the example that approved domain name providers follow when they decentralise the provision of domain names to domain name providers on a national level.³⁹⁵ Likewise, UNCITRAL could decentralise accreditation by maybe allowing an international accreditation institution to accredit only online arbitration service providers on a national level and that are then thereafter required to accredit their own online arbitrators.³⁹⁶ This option might prove to be the most practical option since an international accreditation institution will not be able to be everywhere in the world at the same time.³⁹⁷

UNCITRAL would be well-advised to also start compiling a guideline on the minimum skills and training that neutral third parties and online arbitrators would need in order to be accredited and to render their services.³⁹⁸

UNCITRAL will have to start with the compilation of OADR and online arbitration accreditation principles, procedures and standards.³⁹⁹ It is contended that the OADR and online arbitration accreditation principles, procedures and standards should be included as an 'Annexure on OADR and Online Arbitration Accreditation Principles, Procedures and Standards' at the end of the 'Technical Notes'.⁴⁰⁰ It is furthermore contended that this 'Annexure' would be of greater practical use if it is included in the format of an 'Annexure' instead of inclusion

³⁹⁰ Chartered Institute of Arbitrators 'Guidelines and Ethics', s.p. at <<http://www.ciarb.org/guidelines-and-ethics>>, accessed 20 October 2016.

³⁹¹ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 433.

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ Cortés 'The UDRP Reviewed' *Computer and Telecommunications LR* 14(2008) 133-139.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.*

³⁹⁹ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 434.

⁴⁰⁰ WG.III 'DPR (31st Session-A/CN.9/WG.III/WP.133)' *op cit* Draft Preamble, par.2.

within the ‘Technical Notes’, because then it could also be applied to, and by, online arbitration service providers that do not use the ‘Technical Notes’, but who only want to use the ‘Annexure’— thereby in effect promoting the unification of the *lex electronica arbitralis* regime.⁴⁰¹

2.3.1.2.4. Trustmarks

Online arbitration service providers would have to be able to inform not only the parties, but also potential parties, and the online community in general of their accreditation by an international accreditation institution and the easiest way to do this, is to legitimately being able to place a trustmark of an accredited institution on their website, after they have been evaluated by that institution and found to adhere to all of the principles, procedures and standards that the online arbitration industry sets as minimum requirements .⁴⁰²

It is however contended that a trustmark is only efficient and functional if a critical mass of online buyers and potential online buyers have started to become acquainted with a particular trustmark and started to gain the confidence and respect in a particular trustmark.⁴⁰³ Although it will be difficult, it is not impossible, and could be achieved by an independent public trustmark that is supported by UNCITRAL.⁴⁰⁴ It is contended that an independent public trustmark will be the best option in this regard, as governments and private institutions would likely be disinclined to back trustmarks in their own capacity, as a trustmark does come with the disadvantage of liability.⁴⁰⁵ In this regard, it should perhaps be pointed out that the ‘EU Draft Report on the Proposal for a Directive on ADR for Consumer Disputes and Amending Regulation of 2004’ did envision a pan-European trustmark to be developed a few years ago; however, until this date, nothing has unfortunately come of this, so it is time to restart this debate in the EU, but also in the international context.⁴⁰⁶

2.3.2. Incentives for OADR Users

The success of the ‘Technical Notes’ will to a large degree rely on whether UNCITRAL would be able to devise clever incentives for the parties to, firstly, decide to resolve an online dispute in terms of the ‘Technical Notes’. Secondly, to accept an early resolution during either the Negotiation Phase or

⁴⁰¹ Cortés, De la Rosa ‘Building a Global Redress System’ *op cit* 434.

⁴⁰² Cortés, ‘Accredited ODR Services’ *Information and Communications Technology Law* 17 (2008) 221-237.

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Cortés, De la Rosa ‘Building a Global Redress System’ *op cit* 435.

⁴⁰⁶ European Parliament and Council ‘Draft Report on the Proposal for a Directive on ADR for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC 0793-C7 0454/201-2011/0373(COD)(2004), 65 at <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011PC0793>>, accessed 20 October 2016.

the Facilitated Settlement Phase. Thirdly, to voluntarily comply with either the agreement or the outcome and the resulting enforcement of the award.⁴⁰⁷

The following section will evaluate the importance of these incentives, and although WG.III may have deemed them as not important enough to be included in the 'Technical Notes', UNCITRAL should at least keep these incentives in mind when they revise the 'Technical Notes' in the future.⁴⁰⁸

2.3.2.1. Incentives to Encourage Participation

Some online merchants are not very eager to take part in OADR as it entails additional expenses.⁴⁰⁹ Some online buyers are again attracted to some online merchants and their websites when they know that OADR services will be provided free of charge, or at least at a low-cost fee, once an online dispute arises.⁴¹⁰ Some online merchants may be prepared to finance OADR when they understand that it will lessen the chances of something going wrong for both parties during an e-commerce transaction, enhance their reputation in the online marketplace, put potential online buyers more at ease so that they will feel safer buying online, and as a result attract more online buyers, and eventually allow an online merchant to consolidate their competitive position in the online market.⁴¹¹ An online trustmark could help online buyers identify a reliable online merchant and OADR scheme, even though the effectiveness of such a trustmark depends on the adherence to due process, integrity, legal validity, reputation, sincerity and track record of the OADR scheme.⁴¹²

Online merchants may also be drawn to OADR processes that restrict the number of chargebacks where a credit-card PSP at the online buyer's request demands an online merchant to refund the payment of a disputed transaction.⁴¹³ The main reason for this is that when an online buyer begins a chargeback process, the online merchant is usually required to pay a fee.⁴¹⁴ The second reason is that the online merchant's credit score will be negatively affected; and as a result, the online merchant will have to pay more as the interest rates paid per transaction relies on the number of chargebacks issued against them.⁴¹⁵

The end-goal would however be if national courts could also start to provide economic incentives for parties to participate in OADR.⁴¹⁶ National

⁴⁰⁷ Hörnle 'Encouraging ODR in the EU and Beyond' *op cit* section 7.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

⁴¹⁰ *Ibid.*

⁴¹¹ Balboni 'Trustmarks in E-Commerce' 35.

⁴¹² Balboni *op cit* 35-37.

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.*

⁴¹⁵ Sorkin 'Payment Methods for C2C E-Commerce Transactions' *Akron LR* 35(2001) 1-10.

⁴¹⁶ *Ibid.*

courts or national small claims courts could for example easily enforce a cost sanction whenever a party had unreasonably refused to take part in OADR.⁴¹⁷

2.3.2.2. Incentives for Early Settlements

A sensible recommendation to online arbitration service providers who wants to resolve disputes in terms of the 'Technical Notes' cost-efficiently, would be to follow a three-step, pyramid-shaped, fee structure. The majority of disputes should be settled at the bottom of the pyramid by the parties amongst themselves during the Negotiation Phase; only a few disputes should be escalated to the Facilitated Settlement Phase.⁴¹⁸ The most complex disputes should reach the Final Phase where online arbitration might be possible.⁴¹⁹ The three-step, pyramid-shaped, fee structure would entail that the higher the phase which a dispute escalates, the more costly the OADR process should be.⁴²⁰ The sooner a dispute is resolved, the cheaper the cost of the OADR process should be for the parties.⁴²¹ It would be well-advised that an economically efficient OADR system should incentivise early dispute resolution at the Negotiation Phase and to steer clear of neutral third party intervention as much as possible to keep operational costs low.⁴²²

Disputes will also be settled sooner if claimants receive information about their rights and obligations as soon as they e-file a claim.⁴²³ The information should almost be in the form of a guide for beginners and clearly set out the legal procedure and practice, in easy-to-understand steps for the parties, detailing for instance who carries the burden of proof once a dispute has to be referred to the Final Phase where online arbitration is possible, etc.⁴²⁴ The reason for this is that as soon as a party is able to predict that the outcome of a dispute will be to his/her detriment, the sooner s/he would want to settle the dispute and avoid the Final Phase where online arbitration is possible, especially if the Final Phase requires e-filing fees or other additional fees and will prolong the dispute.⁴²⁵

OADR service providers could even go so far as to keep parties liable for the expenses of the Final Phase where online arbitration is possible, if this

⁴¹⁷ Sorkin *op cit* 1-10.

⁴¹⁸ Hörnle 'Encouraging ODR in the EU and Beyond' *op cit* section 4(a).

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.*

phase does not provide them with a better outcome than the outcome which they got during the Facilitated Settlement Phase.⁴²⁶

2.3.2.3. Incentives to Comply with Outcome

The main aspiration of the 'Technical Notes' should be to ensure successful compliance with resolutions and awards so that it would not be necessary for parties to resort to national courts to enforce a decision and/or an award.⁴²⁷ In this regard, built-in incentives in the 'Technical Notes' could promote voluntary compliance.⁴²⁸

An important incentive that would encourage online merchants to comply with final outcomes would be to reward compliance with a decision and/or an award with a positive rating on either the OADR service provider's website, the online merchant's website or on eBay, or to likewise make an example of them for not complying with an award with a negative rating.⁴²⁹ The possibility that a trustmark could be withdrawn at any time once a decision and/or an award is not honoured is also an incentive.⁴³⁰ Another way could be if the OADR service provider notifies online consumer protection agencies or the relevant public authorities in the country of the online merchant that decisions and/or awards are not being honoured.⁴³¹ Some online consumer protection organisations blacklist online merchants who either refuse to take part in OADR or refuse to comply with OADR agreements, decisions and/or awards.⁴³²

E-commerce is driven by online browsers and search engines, and also these IT components can be designed to reward online merchants who comply with agreements, decisions and/or awards, and to likewise penalise online merchants who refuse to do so.⁴³³ This technology is already partly available as Google Shopping displays third-party reviews of online merchants in its browser, as can be seen on the 'Google for Retail' website.⁴³⁴ The algorithms that Google uses collect these reviews on the Internet automatically whenever they search for the online merchant's domain name.⁴³⁵ With changes to Google's algorithms, and other online browsers' algorithms, they would surely be able to list online

⁴²⁶ Cortés 'A Comparative Review of Offers to Resolve' *Civil Justice Quarterly* 32(1)(2013) 44-47.

⁴²⁷ Del Duca *et al.* 'Designing a Global Consumer ODR System' *op cit* 221.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.*

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² *Ibid.*

⁴³³ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 424.

⁴³⁴ Google 'Google for Retail', s.p. at <<http://www.google.com/ads/shopping>>, accessed 20 October 2016.

⁴³⁵ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 424.

merchants who have who have refused to comply with agreements, decisions and/or awards or whose names have been blacklisted.⁴³⁶

2.3.3. Relationship between the OADR Service Provider and the ODR Platform

UNCITRAL would also have to look at the relationship between OADR service providers and the ODR Platforms that they administer.

The design of an online arbitration regime or *lex electronica arbitralis* is closely related to the definition and function of an OADR service provider and an ODR Platform.⁴³⁷ Many issues arise including the role, function, selection, accreditation and funding of an OADR service provider and its relationship to the ODR Platform as well as to (possibly) any national consumer protection authority. Many questions are still asked in this regard, and UNCITRAL will have to seek answers on these, namely, how would OADR service providers operate and be funded?⁴³⁸ Would the location of the OADR service provider be relevant?⁴³⁹ How would OADR service providers be approved and licensed, and how would they receive or be assigned to cases?⁴⁴⁰ Would claimants select an OADR service provider when they e-file their claims or should a third entity, such as a national consumer protection authority, select the OADR service provider?⁴⁴¹ If the latter, what would be the role and the status of that third entity?⁴⁴² What, if any, charges will OADR service providers levy for their services?⁴⁴³

Some issues arise in relation to the authority, responsibility and obligation of an OADR service provider in the OADR proceedings, namely, how much authority will be given to the OADR service provider?⁴⁴⁴ Certain issues such as determining lateness of submissions, extensions of time and challenges to neutral third parties, contemplate intervention by the OADR service provider.⁴⁴⁵ How will the OADR framework make provision for the monitoring of such intervention?⁴⁴⁶ The 'Technical Notes' says nothing about an extension of time for e-filing a response and where the OADR service provider rejects such request for extension, the OADR service provider should be instructed to provide valid reason for the rejection.⁴⁴⁷ In addition, should the OADR service

⁴³⁶ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 424.

⁴³⁷ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.13.

⁴³⁸ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.13(a).

⁴³⁹ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.13(b).

⁴⁴⁰ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.13(c).

⁴⁴¹ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.13(d).

⁴⁴² *Ibid.*

⁴⁴³ WG.III 'Report of 22nd Session (A/CN.9/716)' *op cit* par.109-par.111.

⁴⁴⁴ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.14.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.14(b).

provider be responsible to oversee the implementation of the settlement or decision?⁴⁴⁸ If so, how?⁴⁴⁹

Another question to be addressed is the relationship between the OADR service provider and the ODR Platform, how these entities should be defined and what their tasks will be.⁴⁵⁰ It should be noted that the flow of communications into and between the service provider and the parties and the Platform must be taken into account when the 'Technical Rules' is revised, so as to ensure that jurisdiction could be determined, because otherwise there will be uncertainty over jurisdiction.⁴⁵¹ Once the definitions and tasks are settled, various other issues relating to the flow of communications should also be considered.⁴⁵²

2.3.4. A Technical Enforcement Protocol

Mechanisms aimed at self-compliance will still be the most effective means of ensuring enforcement. In parallel to legal procedures, UNCITRAL may wish to consider the development of other types of technical procedures.⁴⁵³ Built-in enforcement mechanisms, such as trustmarks, reputation management systems, exclusion of a party from the online marketplace, penalties for delay in performance, escrow systems, and credit card chargebacks are possible solutions meriting further exploration.⁴⁵⁴

3. THE NEED FOR A COMMON APPROACH TO CONSUMER REDRESS: ACHIEVING CONVERGENCE BETWEEN 'UNCITRAL'S TECHNICAL NOTES ON ODR OF 2016' AND THE EU LEGISLATION

The success of the 'Technical Notes' will depend on whether a common approach could be found for consumer redress, and this will most notably depend on whether the 'Technical Notes' will be able to converge further with already existing EU legislation in practice.

The 'Technical Notes' and the EU legislation need to be compatible if they want to encourage cross-border e-commerce.⁴⁵⁵ Since e-commerce and OADR is not supposed to be constrained by physical boundaries, it is of great importance that UNCITRAL find of way to converge the 'Technical Notes' with

⁴⁴⁸ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.14(c).

⁴⁴⁹ *Ibid.*

⁴⁵⁰ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.15.

⁴⁵¹ *Ibid.*

⁴⁵² *Ibid.*

⁴⁵³ UNCITRAL 'Issues for Consideration (A/CN.9/WG.III/WP.110)' *op cit* par.49.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Hodges *et al.* *Consumer ADR in Europe (Civil Justice Systems)* 45.

the set of legal standards that will exclusively regulate online arbitration with the already existing EU national legislation.⁴⁵⁶

Both the 'Technical Notes' and the EU legislation want to promote online arbitration by regulating the OADR, which had been unregulated for long, and ensure that OADR service adhere to due process.⁴⁵⁷ Although the EU legislation ensures adherence to due process requirements through an accreditation system, the EU system also goes further by requiring EU member states to make sure that OADR service providers comply with the procedural guarantees that the 'ADR Directive', article 31 s.v. 'freedom of choice' and 'out of court nature' sets out.⁴⁵⁸ While the 'Technical Notes' follow a two/three-phase process that starts with the Negotiation Phase and ends with either the Facilitated Settlement Phase or the Final Phase, which may comprise online arbitration, the EU regime allows various OADR processes to occur, not just at the Final Phase.⁴⁵⁹

Although it is good that the 'Technical Notes' left the Final Phase wide enough to include various OADR processes, UNCITRAL should also mandate WG.III to compile a set of legal standards exclusively for online arbitration where the procedural standards are narrow enough to guarantee a reasonable degree of due process.⁴⁶⁰ With regards to the EU legislation, it has been said that it would be better for parties if the legislation could draw a more apparent distinction between binding, or adjudicative processes on the one hand and non-binding, or consensual processes on the other hand.⁴⁶¹ Contrary to the EU legislation, the 'Technical Notes' sets very specific procedural standards for the Negotiation Phase, the Facilitated Settlement Phase, without determining the details for the Final Phase, which may comprise online arbitration.⁴⁶²

When UNCITRAL decides to compile a set of legal standards exclusively for online arbitration, the due process rules should draw a clear distinction between non-binding processes, such as the Negotiation Phase, and binding processes, such as a distinct 'Online Arbitration Phase', as each phase requires its own due process requirements.⁴⁶³ An example in point, which are all of particular importance during the online arbitration phase, is the importance of the adversarial principle, the independence of the online arbitrator, transparency

⁴⁵⁶ Hodges *et al.* *Consumer ADR in Europe (Civil Justice Systems)* 45.

⁴⁵⁷ Rogers 'Note on the Resolution Process Designated by the Draft ODR Rules, 14-18 November 2011', s.p. at <<https://cms.unov.org/LLSULinkbase/ContentTree.aspx?nodeID=4379>>, accessed 20 October 2016.

⁴⁵⁸ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* article 31 s.v. 'freedom of choice' and 'out of court nature'.

⁴⁵⁹ Rogers 'Note on the Resolution Process Designated by the Draft ODR Rules Vienna, 14-18 November 2011' *op cit* s.p.

⁴⁶⁰ Hörnle 'Encouraging ODR in the EU and Beyond' *op cit* section 7.

⁴⁶¹ *Ibid.*

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

and the publication of the decision.⁴⁶⁴ In addition, the procedures of the online arbitration phase have a *res iudicata* effect and mandatory consumer legislation limits the principle of autonomy.⁴⁶⁵

Unfortunately, at this point in time, the approaches taken by UNCITRAL and the EU on several matters, for instance the EU's accreditation of OADR service providers, cannot be fully compared as these matters have, in the instance of WG.III was abandoned due to a lack of consensus.⁴⁶⁶ After WG.III's long battle to get the 'Technical Notes' accepted, it will still take many years for UNCITRAL to re-evaluate the 'Technical Notes' and to amend it.⁴⁶⁷ What is already evident at this point in time is that once the 'Technical Notes' is implemented in practice (at this point in time its official text has not as yet been published on the UNCITRAL website), it would have to be able to interact with the EU legislation spontaneously, as EU consumers will take part in processes which will be regulated by the 'Technical Notes'.⁴⁶⁸ UNCITRAL should also keep in mind that parties will not only use the 'Technical Notes' to resolve cross-border disputes when the online buyer lives outside the EU, but also to resolve disputes that arise in the EU internal market.⁴⁶⁹

The need for convergence and similitude between the 'Technical Notes' and the already existing EU legislation requires a solution to the stumbling blocks in the way for a set of legal standards exclusively for online arbitration in addition to the 'Technical Notes', such as the legality of pre-dispute arbitration agreements, the monitoring of the OADR service providers, the enforcement of agreements, decisions and awards and the substantive rules applicable during the OADR process.⁴⁷⁰ These matters are summarised below.

3.1. The Legality of Pre-Dispute Arbitration Agreements

There was continuing disagreement between the WG.III's approach to the 'DPR' and the already existing EU legislation on the different approaches to pre-dispute arbitration agreements.⁴⁷¹ The divergence between these two approaches in a sense reflects the different approaches between the legislation in the USA and the legislation in the EU.⁴⁷²

In the USA, Scalia J of the US Supreme Court has rejected any challenges to pre-dispute arbitration agreements provisions in consumer

⁴⁶⁴ Hörnle 'Encouraging ODR in the EU and Beyond' *op cit* section 7.

⁴⁶⁵ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 426.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*

⁴⁷⁰ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 427.

⁴⁷¹ Martinez *et al.* 'An Analytic Framework for Dispute System Design' *Harvard Negotiation LR* 14 (2009) 1417.

⁴⁷² *Ibid.*

agreements in *Buckeye Check Cashing, Inc. v Cardegna*.⁴⁷³ In the EU, Latin-American countries and Japan, courts invalidate pre-dispute arbitration agreements provisions in consumer agreements, for example in terms of the 'EU Recommendation of the Commission on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes of 1998', article vi, the 'EU Directive on Unfair Terms in Consumer Agreements', annex 1, the 'Argentinean New National Civil and Commercial Code of 2016', article 739 and the 'Japanese Arbitration Act 138 of 2003', annex 3.⁴⁷⁴ In the EU, an online buyer cannot in terms of the EU 'Directive on Unfair Terms in Consumer Agreements of 1993', Annex 1, and the 'Proposed Regulation on Common European Sales Law (CESL)', draft article 84(d) commit or be committed to an out-of-court procedure before an online dispute arises.⁴⁷⁵ The reason for this is that such a commitment would deprive the online buyer of the so-called 'principle of liberty', which is the right which every citizen of the EU has to let a national court adjudicate a dispute.⁴⁷⁶ The inviolability of the 'principle of liberty' aspect was clearly indicated and upheld by Jann J of the CJEU in both *Asturcom Telecomunicaciones v Christina Rodrigues Nogueira* and the same judge again in the same court in *Elisa María Mostaza Claro v Centro Móvil Milenium SL* where he found twice that such provisions are unfair.⁴⁷⁷ In addition, in terms of the 'EU ADR Directive', article vi, the 'principle of liberty' requires clear consent from consumers whenever they decide to take part in a OADR process which is binding in nature.⁴⁷⁸

These divergent approaches are represented in the 'NY Convention'.⁴⁷⁹ In terms of the 'NY Convention', article II(1) pre-dispute arbitration agreements are legally valid and states who had signed the 'Convention' will have to respect

⁴⁷³ *Buckeye Check Cashing, Inc. v Cardegna* 546 US 440 (2006).

⁴⁷⁴ EU Commission 'Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Resolution of Consumer Disputes 1998 OJ (L 115)', article vi, 'Principle of Liberty' at <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001H0310>>, accessed 20 October 2016; EU Commission 'Directive on Unfair Terms in Consumer Agreements (1993) (1993/13/EC)', annex 1 at <<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:31993L0013>>, accessed 20 October 2016; Arley 'Three Dimensional Analysis of Electronic Dispute Resolution' *Revue Droit International* 1 (2012) 101; 'Japanese Arbitration Act 138 of 2003', Annex 3; 'Argentinean New National Civil and Commercial Code of 2016'; 'Japanese Arbitration Act 138 of 2003'.

⁴⁷⁵ EU Commission 'Directive on Unfair Terms (1993) (1993/13/EC)' *op cit* Annex 1; EU Commission 'Proposed Regulation on Common European Sales Law (CESL) (COM/2011/0635)', draft article 84 at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011PC0635>>, accessed 20 October 2016.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ CJEU *Asturcom Telecomunicaciones v Christina Rodrigues Nogueira* (C40/08); *Elisa María Mostaza Claro v Centro Móvil Milenium* (C-168/05); *Elisa María Mostaza Claro v Centro Móvil Milenium SL* (2006) ECR I-10421.

⁴⁷⁸ EU Commission 'Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Resolution of Consumer Disputes 1998 OJ (L 115)' *op cit* article vi, 'Principle of Liberty'.

⁴⁷⁹ UNCITRAL 'NY Convention (1958)' *op cit s.p.*

the legal validity of agreements of this nature.⁴⁸⁰ The 'NY Convention', article V however lists numerous exceptions which specifically regulates instances where the recognition and enforcement of an arbitration award contradicts the public policy of the country where a party seeks to enforce an award.⁴⁸¹ The recognition and enforcement of an arbitration award is therefore not applicable in terms of article V as long as the consumer protection legislation is public policy in a country.⁴⁸² Article II(1) and article V embodies the two different approaches to pre-dispute arbitration agreements of the USA and EU; these two different approaches essentially put two different theories of a legal and political and economic nature at play, namely a more capitalist-orientated approach in the USA that almost comes down to a 'market-individualism' approach, while the EU follows a more social-democratic approach that almost comes down to a 'consumer-welfarism' approach.⁴⁸³

Interestingly enough, a nexus exists because there are EU countries where pre-dispute consumer arbitration agreements are not seen as legally unfair.⁴⁸⁴ In certain instances, pre-dispute arbitration agreements are allowed for practical reasons due to the high value of the dispute.⁴⁸⁵ The 'UK's Arbitration Act', article 69 makes provision for pre-dispute arbitration agreements if claims are in excess of the limit for small claims in the UK's civil courts, which is at the moment £5,000.⁴⁸⁶ In France, according to the finding of the *Cour de Cassation* in *Meglio v V* and *Lemontey J in Phillipe Renault v Sociétés V2000*, pre-dispute arbitration agreements are allowed in terms of the 'French Civil Code', article 2061, but just for disputes of high-value and international disputes, and not for domestic arbitration.⁴⁸⁷ Nevertheless, since the British and French exceptions both pertain to high-value disputes, their focus are not completely the same as the low-value e-commerce disputes that the 'Technical Notes' are focused on.⁴⁸⁸

For the intents and purposes of the 'Technical Notes', UNCITRAL will be better advised to evaluate circumstances in which national legislation makes provision for pre-dispute arbitration agreements as long as consumers are sufficiently protected and guaranteed of a fair and just OADR process, and are properly informed about the consequences of a pre-dispute arbitration agreement.⁴⁸⁹ For instance, EU members such as Austria, in the 'Austrian Code

⁴⁸⁰ UNCITRAL 'NY Convention (1958)' *op cit* article II(1).

⁴⁸¹ UNCITRAL 'NY Convention (1958)' *op cit* article v.

⁴⁸² UNCITRAL 'NY Convention (1958)' *op cit* article v; Hamilton 'Pre-Dispute Consumer Arbitration Provisions' *McGill LJ* 51(2006) 693.

⁴⁸³ Hamilton *op cit* 693.

⁴⁸⁴ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 428.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ 'UK Arbitration Act 23 of 1996', article 69.

⁴⁸⁷ 'French Civil Code', article 2061; *Meglio v V* (2000) *Cour de Cassation*, 21 May 1997; *Phillipe Renault v Sociétés V2000* (2000) *Cour de Cassation*, 21 May 1997; Kaufmann-Kohler, Schultz *ODR* 177.

⁴⁸⁸ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 429.

⁴⁸⁹ Sternlight 'Is ADR Consistent with the Rule of Law' *DePaul LR* 56(2006) 569.

of Civil Procedure of 1895/2013', Fourth Chapter, article 583, and Germany, in the 'German Arbitration Act of 1998', article 1031, require clear and proper notice of arbitration in consumer transactions.⁴⁹⁰ In both instances, pre-dispute arbitration agreements must be contained in a separate document, namely the arbitration agreement, which is a safeguard to ensure that the consumer has applied his/her mind and made an informed choice when deciding to have a dispute resolved by arbitration; it is also an attempt to deter hidden provisions in the main agreement to subject claims to arbitration unknowingly.⁴⁹¹

With e-commerce, the separate arbitration agreement is usually in the format of a so-called 'click-wrap agreement' whereby a party signals his/her intention to be bound by an agreement and its terms and conditions by simply clicking 'Yes, I agree'.⁴⁹² Again, this is an attempt to deter hidden provisions in the main agreement to subject claims to arbitration unknowingly.⁴⁹³ Properly informing online buyers on an arbitration provision and its consequences are also an important way to protect online buyers.⁴⁹⁴ In this regard, the EU 'Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Resolution of Consumer Disputes 1998 OJL 115', article vi, s.v. 'Principle of Liberty' contains the proviso that the decision of an OADR body will only bind the parties in the event that they were informed of the decision's binding nature in advance and have specifically both accepted to subject themselves to this outcome.⁴⁹⁵

Another example of an EU member state's national legislation that makes provision for pre-dispute arbitration agreements as long as consumers are sufficiently protected and guaranteed of a fair and just OADR process, is the 'Spanish Consumer Arbitration Act 231 of 2008', where article 24, contains the proviso that pre-dispute arbitration agreements and post-dispute arbitration agreements are both equally valid, as long as the dispute is submitted to the publicconsumer arbitration system.⁴⁹⁶

The UK, French, Austrian, German and Spanish examples of exceptions indicates that the national legislation of EU member states does make provision for pre-dispute arbitration agreements, and that these agreements may be valid

⁴⁹⁰ 'Austrian Code of Civil Procedure of 1895/2013', article 583; 'German Arbitration Act of 1998', article 1031; Sternlight *op cit* 569.

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid.*

⁴⁹³ *Ibid.*

⁴⁹⁴ *Ibid.*

⁴⁹⁵ EU Commission 'Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Resolution of Consumer Disputes 1998 OJ (L 115)' *op cit* article vi, 'Principle of Liberty'.

⁴⁹⁶ 'Spanish Royal Decree 231/2008', article 24; De Otaola Zamora 'Cyber Law in Spain', p.236 at <https://books.google.co.za/books?id=WEkwrjB5IEMC&pg=PA170&lpg=PA170&dq=Spanish+Royal+Decree+231/2008&source=bl&ots=9LqtG6AaSe&sig=IN_Ks_z2ybiyYxy2u1oNwY6AzrE&hl=en&sa=X&ved=0ahUKewiSk6zVofHPAhuBBsAKHXKaBKIQ6AEINDAE#v=onepage&q=Spanish%20Royal%20Decree%20231%2F2008&f=false>, accessed 20 October 2016.

in terms of EU law, on condition that consumers are properly informed in advance of what a pre-dispute arbitration agreement is and what its consequences are, if it is contained in a separate document and if a fair OADR process can be guaranteed that will adhere to the requirements of due process.⁴⁹⁷ These examples of EU member states which acknowledge the legal validity of pre-dispute arbitration agreements in certain instances indicates that if a working group of the EU Parliament and Council and UNCITRAL, could somehow get together and define the information and due process guarantees which needs to be presented and afforded to online buyers to make a pre-dispute consumer arbitration agreement valid, this major stumbling block in the way of the *lex electronica arbitralis* could somehow be overcome.⁴⁹⁸

An ideal solution would be if the EU legislation could be amended to be more neutral in this regard. Unfortunately, unlike the neutrality in terms of the validity of pre-dispute arbitration agreements found in the 'EU Draft Report on the Proposal for a Directive on ADR for Consumer Disputes of 2004', par. 21(b), the 'EU Directive on Consumer ADR of 2013', Preamble, article 43 constituted a full ban on pre-dispute arbitration agreements.⁴⁹⁹ It is contended that there should be no impediment to deem a pre-dispute arbitration agreement valid, as long as parties are properly informed of what a pre-dispute arbitration agreement is and what its consequences are and as long as a minimum standard of consumer protection is respected during the OADR process.⁵⁰⁰

Although it is hoped that parties who resolve a dispute in terms of the 'Technical Notes' would not have to resort to court proceedings, it still has to be possible for them to do so by means of collective or class actions, and consequently UNCITRAL would have to compile the set of legal standards exclusively for online arbitration in an accessible and user-friendly manner for online arbitration to be deemed as legally valid.⁵⁰¹

3.2. Are the 'UNCITRAL Technical Notes on ODR of 2016' Destined to Succeed or Fail?

WG.III's deliberations on the 'DPR' was confronted with a big obstacle almost right from the beginning, after certain delegations, most notably the USA, sought the inclusion of a provision that would see pre-dispute arbitration agreements as binding on both online merchants and online buyers, while other delegations, most notably the EU and Canada, opposed this idea as it is

⁴⁹⁷ De Otaola Zamora *op cit* 236.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ European Parliament and Council 'Draft Report on the Proposal on ADR for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (COM (2012) 0793-C7 0454/2011–2011/0373(COD))' *op cit* par.21(b); EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit* Preamble article 43.

⁵⁰⁰ Cortés, De la Rosa 'Building a Global Redress System' *op cit* 430.

⁵⁰¹ Kaufmann-Kohler, Schultz *ODR op cit* 204.

incompatible with their national consumer protection legislation.⁵⁰² A solution to this impasse finally came at WG.III's 26th Session when the solution of the 'Two-Track' system was suggested, to the effect that online merchants should submit to, and OADR service providers should offer, different OADR processes depending on where the online buyer comes from or is incorporated.⁵⁰³ Although the 'Two Track' solution is an appealing solution, and although it also has its flaws, the question that still comes to mind is, is it not too little too late?⁵⁰⁴

Since WG.III on OADR was launched at its 22nd Session in 2010, a lot has happened in the online arbitration and IT environment in legal and technical terms, ranging on the legal side from the adoption, by the European Commission, of its own rules on OADR, namely the 'ADR Directive' and also the 'Regulation on OADR'.⁵⁰⁵ Other legal jurisdictions have also started to slowly follow the EU experience, and to update their national legislation to help regulate OADR which means that by the time WG.III finally managed to complete the 'Technical Notes' and UNCITRAL accepted it, WG.III had to compete with already established and enforced national legislation and regulations, in addition to the EU Directives.⁵⁰⁶ Although the 'Technical Notes' has a wider universal reach, but is more focused on cross-border, low-volume e-commerce disputes, national legislation together with national consumer protection will only create more and more obstacles, the longer it takes for UNCITRAL to revisit the 'Technical Notes' in future and to compile a set of legal standards exclusively for online arbitration.⁵⁰⁷

In addition, UNCITRAL is also confronted by the question of enforceability, because now that the 'Technical Notes' is adopted and parties agree to follow them and to submit their dispute to an online arbitrator, what is going to happen if one party refuses to adhere to the online arbitrator's decision?⁵⁰⁸ If the delegation of the USA to WG.III has their way, the other party would be able to have the ruling recognised in terms of the 'NY Convention', article 2.⁵⁰⁹ Although this is theoretically possible, this is not a practical option, when one takes into consideration that the average online purchase, according to the research of Daily Infographic, is in the range of US\$60, and that this will

⁵⁰² Beynekhlef, Vermeys 'Are UNCITRAL DPR for ODR Doomed to Fail?' at <http://www.slaw.ca/2013/06/05/are-uncitrals-draft-procedural-rules-for-odr-doomed-to-fail/>, accessed 25 August 2016.

⁵⁰³ WG.III 'Report of 26th Session (A/CN.9/762)' *op cit* par.14-par.24.

⁵⁰⁴ Beynekhlef, Vermeys 'UNCITRAL DPR' *op cit s.p.*

⁵⁰⁵ EU Commission 'ADR Directive (2013) (2013/11/EU)' *op cit s.p.*; EU Commission 'Regulation on OADR (2013)' *op cit s.p.*

⁵⁰⁶ Beynekhlef, Vermeys 'UNCITRAL DPR' *op cit s.p.*

⁵⁰⁷ *Ibid.*

⁵⁰⁸ Beynekhlef, Vermeys 'UNCITRAL DPR' *op cit s.p.*

⁵⁰⁹ UNCITRAL 'NY Convention (1958)' *op cit* article 2.

consequently in many instances result in higher legal fees than what the item or service, which was bought or procured, is worth⁵¹⁰

There are also other possible solutions than those that WG.III had been discussing that are also practical for the resolution of e-commerce disputes, such as a chargeback mechanism.⁵¹¹ Besides this, different types of solutions could also be combined and UNCITRAL should not forget about looking further at possible combinations.⁵¹² When looking for examples of best practices, UNCITRAL will be well-advised to look at the Canadian Consumer Measures Committee (CCMC)'s 'Internet Sales Agreement Harmonisation Template' which contains best practices for B2C e-commerce.⁵¹³ The Template contains firm guidelines that online merchants should follow when it comes to cancellation and chargeback policies and how to manage the personal information of online buyers.⁵¹⁴ The Canadian provinces of Alberta, Ontario and Quebec, have since chosen to incorporate sections of the Template into the 'Alberta Fair Trading Act, R.S.A. of 2000', article 16, the 'Ontario Consumer Protection Act S.O. of 2002', article 7(2) and the 'Quebec Consumer Protection Act, R.S.Q. of 1971', article 11(1).⁵¹⁵ UNCITRAL should definitely look into the Template's aforementioned chargeback option's inner workings, because in the event that the online merchant refuses to refund an online buyer after the goods were not delivered or if the wrong goods were delivered or if the service which has been procured were not delivered or delivered unsatisfactory, the online buyer is allowed to ask his/her credit card company or payment service provider for a refund.⁵¹⁶ Of course a chargeback option does have its flaws, but if it could be coupled with the outcome of an online arbitration proceeding after an online arbitrator has made his/her decision and decided on the award, this may just be the most practical way to obtain swift redress, and work better than some of the other options that WG.III explored.⁵¹⁷

Consequently, to get back to the question that was asked earlier in this section of whether WG.III has not been doing too little for too long, and in addition, will the 'Technical Notes' one day succeed or will it be doomed for failure? Although a lot of obstacles existed and still exist, many have more or less been moved out of the way while others are still obstructing progress. Deliberations will hopefully pick up again in the future when UNCITRAL decide

⁵¹⁰ Daily Infographic 'Men vs Women' s.p. at <<http://www.dailyinfographic.com/men-vs-women-online-shopping-infographic>>, accessed 5 November 2016.

⁵¹¹ Erdle *op cit* s.p.

⁵¹² Beynekhlef, Vermeys 'UNCITRAL DPR' *op cit* s.p.

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*

⁵¹⁵ 'Alberta Fair Trading Act, R.S.A. of 2000, C. F 2', article 16; 'Ontario Consumer Protection Act S.O. of 2002, C. 30' (Schedule A), article 7(2); 'Quebec Consumer Protection Act, R.S.Q. of 1971, c. P-40.1', article 11.1.

⁵¹⁶ Beynekhlef, Vermeys 'UNCITRAL DPR' *op cit* s.p.

⁵¹⁷ *Ibid.*

to revisit the 'Technical Notes' and to make some necessary amendments and to compile a set of legal standards exclusively for online arbitration, that will ultimately lead to practical and easily implementable solutions that will be welcomed by both online buyers and online merchants and both parties hailing from legal jurisdictions that acknowledge pre-dispute arbitration agreements and parties that do not hail from legal jurisdictions that acknowledge pre-dispute arbitration agreements, *etc.* UNCITRAL should not wait for too long before they start with this process. Nonetheless, it should be said in the same breath that if we were betting men and women, we shall in most likelihood not wager too much on UNCITRAL's swift compilation of a set of legal standards exclusively for online arbitration and a subsequent swift acceptance by UNCITRAL thereof, soon, as UNCITRAL would still need to look at numerous aspects, like this thesis has shown, before it can compile a set of legal standards exclusively for online arbitration that could regulate the Final Phase of the 'UNCITRAL Technical Notes on ODR of 2016'.

It is a pity that UNCITRAL ambitious initial intention of compiling procedural rules went to the current reality of simple non-binding, technical notes and that OADR and online arbitration will now not be making its way into the UNCITRAL legislative regime in Procedural Rules-format, but rather in Technical Notes-format, similar to a guideline format that contains pointers. This of course has a major effect on the institution of an international online arbitration regime, or a *lex electronica arbitralis*, because instead of having a legislative-based regime, the initial phases preceding online arbitration will henceforth only be 'regulated' in a non-binding, guideline format by the 'Technical Notes'.

The 'Technical Notes' does however reflect an out-dated view of OADR that accords more with the standard practices of the initial online platforms such as ECODIR, and not as much with more recent endeavours that employ artificial intelligence (AI), cyberjustice, cybercourts, knowledge management systems, self-enforcement schemes, *etc.*⁵¹⁸

After UNCITRAL finally adopted the 'UNCITRAL Technical Notes on ODR of 2016' on 5 July 2016 during its 49th Session,⁵¹⁹ it can be said that after five years of hard work, WG.III only managed to produce Technical Notes in a guideline format and that this is a non-binding, undetailed document that gives a somewhat outdated view of already existing OADR and online arbitration practices and whose non-binding nature will have little to no impact on current or

⁵¹⁸ Beynekhlef *et al.* 'UNCITRAL Adopts Technical Notes on ODR', *s.p.* at <<http://www.slaw.ca/2016/04/18/uncitral-adopts-technical-notes-on-odr/>>, accessed 24 November 2016.

⁵¹⁹ UNCITRAL 'Report of 49th Session (A/70/17)' *op cit* section V.

future online arbitration service providers, but that has the advantage that it incorporates OADR and online arbitration into the UNCITRAL regime.⁵²⁰

According to the 'Technical Notes', Section I: 'Introduction', article 3 the purpose of the 'Technical Notes' is to nurture the development of OADR and to support OADR administrators, ODR platforms, neutral third parties and the parties engaged in OADR proceedings.⁵²¹ Due to the 'Technical Notes' lack of detailed, in-depth, up-to-date, legal and technical provisions, it is doubtful that the 'Technical Notes' will really support OADR administrators, ODR platforms, neutral third parties, and the parties engaged in OADR proceedings in practice.⁵²² What is however true is that UNCITRAL's endorsement of OADR will help to nurture OADR and online arbitration's development or, at the very least, won't impede it. It also lays the foundation for further work by UNCITRAL to be done in future, most notably to compile a set of legal standards exclusively for online arbitration.

As could be expected, due to the fact that WG.III could not manage to reach consensus on many of aspects of the 'DPR', many of the concepts and principles of the 'Technical Notes' are not revolutionary.⁵²³ Section I; 'Introduction', s.v. 'Non-Binding Nature of the Technical Notes', article 6 do state that the 'Technical Notes' is not intended to offer an exhaustive or exclusive list of possible OADR mechanisms, but it does present online consumers with an archetypal view of what OADR is and how it should be conducted.⁵²⁴ It is user-friendly and accessible and is compiled in a manner that would be easily comprehensible to parties who have never before taken part in OADR or online arbitration.

If it is kept in mind that after WG.III's 31st Session it was thought that WG.III's work to compile the 'DPR' and to constitute an OADR and online arbitration regime would stop dead, the simple fact that WG.III could manage to reach consensus on the existence of the 'Technical Notes' and its contents, is, at its very least, better than nothing.⁵²⁵ In addition, if it is kept in mind how much effort and time WG.III's delegations, observers, and members of UNCITRAL Secretariat had spent on this process and how extremely difficult it was to have reached an outcome in the form of the 'Technical Notes' that could satisfy entirely opposed perspectives and already existing legislation, it would have been utterly disappointing if WG.III would have otherwise simply reached consensus on the fact that no consensus exists and agree to disagree and leave

⁵²⁰ Beynekhlef et al. 'UNCITRAL Adopts Technical Notes on ODR' op cit s.p.

⁵²¹ WG.III 'Draft Outcome Document Reflecting Elements and Principles of an ODR Process (33rd Session-A/CN.9/WG.III/WP.140)' op cit section I: 'Introduction', article 3.

⁵²² Beynekhlef et al. 'UNCITRAL Adopts Technical Notes on ODR' op cit s.p.

⁵²³ Ibid.

⁵²⁴ UNCITRAL 'Report of 49th Session (A/70/17)' op cit section I s.v. 'Non-Binding Nature of Technical Notes', article 6.

⁵²⁵ WG.III 'DPR (31st Session-A/CN.9/WG.III/WP.133)' op cit s.p.

the whole process at that.⁵²⁶ At least we now sit with a document that will officially be made available to the public shortly. In this regard, the 'Technical Notes' can be seen as a success, even though it does not exclusively regulate online arbitration.⁵²⁷

The fact that WG.III have now managed to complete the 'Technical Notes', does however not leave this process with a final answer. Many legal and technical questions and *lacunae* still exist that needs answers and it can at this point in time only be hoped that UNCITRAL will mandate WG.III to revisit the 'Technical Notes' and to make the necessary amendments and to add the necessary 'Annexures' and to compile a set of legal standards exclusively focused on online arbitration that will be able to take the Final Phase of the 'Technical Notes' further, as soon as possible.

4. FUTURE DIRECTION OF ONLINE ARBITRATION IN SA

4.1. The SA Legal and Technical Environment

Much has been written over the years of the 'SA Constitution of 1996' as one of the most modern and progressive constitutions in the world.⁵²⁸

The difficult political past of SA has exacerbated the digital divide of not only the country itself towards the rest of the world, but also amongst its citizens, most notably when it comes to literacy and computer literacy. This digital divide has also had its effect on SA's legal and IT culture, especially when it comes to online arbitration.⁵²⁹ Since SA experiences many economic and technical challenges, online arbitration schemes has not yet maximised its potential.⁵³⁰

Due to the fact that online arbitration essentially involves the use of IT and software applications to, directly or indirectly, adjudicate an online dispute, it is a prerequisite for SA to have an efficient enabling IT or legal framework and regulated technical industry that can support online arbitration schemes.⁵³¹

4.2. SA's Preparedness for Online Arbitration

In order to pave the way for the diffusion of online arbitration in SA, the country needs to develop a solid IT infrastructure.⁵³² In this regard, all of the

⁵²⁶ Beynekhlef *et al.* 'UNCITRAL Adopts Technical Notes on ODR' *op cit* s.p.

⁵²⁷ *Ibid.*

⁵²⁸ Brand SA 'SA's Constitution', s.p. at <<https://www.brandsouthafrica.com/south-africa-fast-facts/news-facts/constitution>>, accessed 15 November 2016.

⁵²⁹ Wahab 'ODR for Africa', 561 at <<http://www.mediate.com/pdf/wahab1.pdf>>, accessed 15 November 2016.

⁵³⁰ *Ibid.*

⁵³¹ Wahab *op cit* 562.

⁵³² *Ibid.*

relevant roleplayers in SA, would have to apply their minds on how to improve several important indicators that is needed to make sure that SA is more prepared to support online arbitration. The following factors would all have to be looked at, namely, firstly, the improvement of SA's IT-enabling infrastructure. Secondly, the improvement of the country's literacy indicators. Thirdly, the improvement of the country's financial indicators. Fourthly, making sure that the country has enabling legislation. Sixthly, helping online arbitration service providers get off the ground.⁵³³

4.2.1. IT-Enabling Infrastructure

According to the latest statistics of WebAfrica on access to the Internet in SA, SA has 26.84 million Internet users.⁵³⁴ 40.9% of SA households have at least one person who either uses the Internet at home or have Internet access somewhere else.⁵³⁵ However, only 10% of households have Internet access.⁵³⁶

4.2.1.1. Internet Users in SA

According to WeAreSocial UK published its 'Global Digital Report of 2016', the 26.84 million Internet users in SA, equates to an Internet penetration rate of 49%.⁵³⁷

4.2.2. Literacy Indicators

Due to the fact that SA is a developing nation, this has an effect on education, literacy and computer literacy rates. In the SA instance, these numbers are quite high.⁵³⁸

4.2.3. Financial Indicators

The SA economy has grown 2.91% annually since 1994.⁵³⁹

⁵³³ Wahab *op cit* 563.

⁵³⁴ HTXT.Africa 'SA's 26.million Internet Users Spend Almost Three Hours a Day on Social Media', s.p. at <<http://www.htxt.co.za/2016/04/29/the-stuff-south-africa-26-8-mil-internet-users-spend-most-their-time-doing-online/>>, accessed 5 November 2016.

⁵³⁵ Web Africa 'Latest Statistics on SA Internet Penetration', s.p. at <<https://www.webafrica.co.za/blog/general/latest-statistics-south-african-internet-penetration/>>, accessed 5 November 2016.

⁵³⁶ Web Africa 'Latest Statistics on SA Internet Penetration' *op cit* s.p.

⁵³⁷ WeAreSocial UK 'Global Digital Report (2016)', s.p. at <<http://wearesocial.com/uk/special-reports/digital-in-2016>>, accessed 5 November 2016.

⁵³⁸ Central Connecticut State University 'South Africans Among the Most Illiterate in the World', s.p. at <<https://businesstech.co.za/news/lifestyle/116230/south-africans-among-the-most-illiterate-in-the-world/>>, accessed 5 November 2016.

The proliferation of online arbitration in SA is decelerated by a low GDP growth rate, low economic activity and a low inflow of FDI.⁵⁴⁰

4.2.4. Enabling Legislation

An enabling legal infrastructure that will provide a compatible online arbitration regulatory framework will also boost trust and confidence in SA.

4.2.4.1. Legislation in Support of E-Commerce

SA has recently underwent a proliferation of several legislative initiatives that support IT and software applications and services, most notably when it comes to firstly, electronic signatures; secondly, the admissibility and evidentiary weight of online evidence; and lastly, online consumer legislation.⁵⁴¹

4.2.4.2. Admissibility of Electronic Signatures

The 'SA ECTA' was promulgated to regulate and promote online communications and e-commerce transactions, consumer protection, e-government services and electronic signatures.⁵⁴²

4.2.4.3. The Admissibility and Evidentiary Weight of e-Evidence

In SA, online documents and online data are admissible as evidence, and is given the same evidentiary weight as physical documents.⁵⁴³

The 'SA ECTA', article 15, inspired by the 'Model Law on E-Commerce', article 9, deals with the law of e-evidence.⁵⁴⁴ Article 15, makes provision for the general admissibility of data messages if it satisfies the ordinary requirements of SA Law of evidence for the admissibility of documents, which are, firstly, authenticity; and secondly, the ability to be produced and presented in their original form.⁵⁴⁵ When evidence has been admitted, the court has a discretionary power to decide what evidentiary weight should be given to it.⁵⁴⁶ The 'SA ECTA' creates two statutory presumptions in favour of the correctness of data messages, firstly, article 15(4)'s presumption in favour of the accuracy of

⁵³⁹ Trading Economics 'SA's GDP Growth Rate: 1994-2017', s.p. at <http://www.tradingeconomics.com/south-africa/gdp-growth>, accessed 15 November 2016.

⁵⁴⁰ Wahab *op cit* 568.

⁵⁴¹ Wahab *op cit* 569.

⁵⁴² 'SA ECTA 25 of 2002'.

⁵⁴³ *Ibid.*

⁵⁴⁴ UNCITRAL 'Model Law on E-Commerce (1996)' *op cit* article 9.

⁵⁴⁵ 'SA ECTA 25 of 2002', article 15.

⁵⁴⁶ Wahab *op cit* 574.

business records, and secondly, article 13's presumption in favour of advanced electronic signatures.⁵⁴⁷

4.2.4.4. The Protection of Online Users

The legal and physical and virtual protection of Internet users is very important for the growth of e-commerce and online arbitration.

The 'SA ECTA' regulates online communications in SA.⁵⁴⁸ Chapter 3 regulates electronic transactions: Part 1 sets out the legal requirements for data messages; Part 2 sets out the communication of data messages.⁵⁴⁹ Chapter 5 regulates cryptography providers.⁵⁵⁰ Chapter 6 regulates the authentication of service providers.⁵⁵¹ Chapter 7 regulates online consumer protection.⁵⁵²

Moreover, the 'SA CPA 68 of 2008' was also promulgated.⁵⁵³ This 'Act' also governs e-commerce transactions.⁵⁵⁴ Chapter 2 sets out fundamental consumer rights.⁵⁵⁵ Part G sets out the right to fair, just and reasonable terms and conditions.⁵⁵⁶ Although this Part does not make specific reference of pre-dispute arbitration agreement, it does have bearing on it: article 48 regulates unfair, unreasonable or unjust agreement terms.⁵⁵⁷ Article 49 requires notice for certain terms and conditions.⁵⁵⁸ Article 50 regulates written consumer agreements.⁵⁵⁹ Article 52 sets out the powers of the courts to ensure fair and just conduct, terms and conditions.⁵⁶⁰ Article 70, sets out the right to ADR.⁵⁶¹ In terms of article 70(1) a consumer may resolve any dispute by referring the matter to ADR.⁵⁶² Chapter 3, Part C, regulates redress by the courts.⁵⁶³

Chapter 5 established the SA National Consumer Commission.⁵⁶⁴

The sum total of all of the above indicates that SA has an advanced IT regulatory matrix.⁵⁶⁵

⁵⁴⁷ 'SA ECTA 25 of 2002', article 13; article 15.

⁵⁴⁸ 'SA ECTA 25 of 2002'.

⁵⁴⁹ 'SA ECTA 25 of 2002', Chapter 3: Part 1; Chapter 3: Part 2.

⁵⁵⁰ 'SA ECTA 25 of 2002', Chapter 5.

⁵⁵¹ 'SA ECTA 25 of 2002', Chapter 6.

⁵⁵² 'SA ECTA 25 of 2002', Chapter 7.

⁵⁵³ 'SA CPA 68 of 2008'.

⁵⁵⁴ 'SA ECTA 25 of 2002'; 'SA CPA 68 of 2008'.

⁵⁵⁵ 'SA CPA 68 of 2008', Chapter 2.

⁵⁵⁶ 'SA CPA 68 of 2008', Chapter 2, Part G.

⁵⁵⁷ 'SA CPA 68 of 2008', article 48.

⁵⁵⁸ 'SA CPA 68 of 2008', article 49.

⁵⁵⁹ 'SA CPA 68 of 2008', article 50.

⁵⁶⁰ 'SA CPA 68 of 2008', article 52.

⁵⁶¹ 'SA CPA 68 of 2008', article 70.

⁵⁶² 'SA CPA 68 of 2008', article 70(1).

⁵⁶³ 'SA CPA 68 of 2008', Chapter 3, Part C.

⁵⁶⁴ 'SA CPA 68 of 2008', Chapter 5.

⁵⁶⁵ Wahab *op cit* 576.

4.2.5. Online Arbitration Service Providers

Despite being a developing country with numerous barriers to IT progression and the proliferation of online arbitration, SA has in a certain sense managed to create its own unique OADR culture with its industry-specific online arbitration initiative when it comes to resolving domain name disputes.⁵⁶⁶

4.2.5.1. Domain Name Dispute Regulations

The 'SA Domain Name Disputes Regulation ('ZADRR')' is SA's own OADR mechanism to resolve disputes involving the .za domain name.⁵⁶⁷ The service provider is SAIPL. SAIPL's adjudicators use a documents-only arbitration procedure, based on relevant regulations and their previous precedent.⁵⁶⁸ All parties are allowed to appeal a decision.⁵⁶⁹ The appeal panel will consider appeals on the basis of a full review of the matter and may also review procedural matters.⁵⁷⁰ However, no monetary damages are awarded and no injunctive relief is available.⁵⁷¹ Accredited domain name registries then implement a decision after ten days, if the decision is not appealed.⁵⁷² The adjudicators' decisions are self-executionary because the accredited registries are compelled to enforce a decision, such as the cancellation or transferral of a domain name.⁵⁷³

4.3. Prospects for Future Growth of Online Arbitration in SA

Since online arbitration is still a nascent industry in SA with very few private online arbitration service providers, it leads to the interesting observation that SA is generally outsourcing online arbitration to international service providers who extend their services to SA. This means that although South Africans are increasingly more active online, they still have to use online arbitration service providers that are located elsewhere, while mostly everything that is needed to build a prosperous online arbitration industry in SA is right here at the country's disposal.⁵⁷⁴ This has had a negative effect on the growth of online arbitration in SA and on the availability of bespoke online arbitration

⁵⁶⁶ Wahab *op cit* 577.

⁵⁶⁷ SAIPL 'Domain Disputes Regulations (2006)' *op cit s.p.*

⁵⁶⁸ Snail *et al.* 'A Brief Excursus on SA Dispute Resolution' *op cit s.p.*; Wahab *op cit* 578.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid.*

⁵⁷² *Ibid.*

⁵⁷³ *Ibid.*

⁵⁷⁴ Wahab *op cit* 582.

services. The result is that available IT and software applications do not cater for SA languages, culture and customs.

Since the SA justice system and court system is overburdened, online arbitration presents an opportunity for the SA government to get involved and to encourage online arbitration by adopting and incentivising pilot projects, especially in the fields of e-government and e-commerce.⁵⁷⁵ With regards to disputes associated with e-government, the SA government could either establish and operate, or simply hire an established OADR service provider that would resolve G2C (government-to-consumer) and G2B (government-to-business) administrative disputes.⁵⁷⁶

The fact that SA is a beacon of hope for the rest of Africa, that SA serves as a gateway to the rest of Africa and that SA is one of the world's most successful examples from a peaceful transition from an authoritarian state to a democracy, and due to the fact that SA is a key role player in the African Union (AU), creates a unique opportunity for online arbitration in SA. Due to the fact that SA is part of the African continent, a continent which is at many times plagued by civil war, political unrest, election outcomes that are disputed, warring factions and warring political parties, *etc.*, such forms of political unrest could be adjudicated by online arbitration. In many instances this could prove the only solution to get adversary parties to come together, because in many instances a warring faction leader or party will fear for their lives if they were to go outside the area or region of a country where their support base is located. Online arbitration may offer novel and efficient schemes to resolve disputes of this nature, especially when it is kept in mind that the failure to resolve fighting over election results will only lead to the escalation of conflict, further jeopardising democratic processes and political stability of SA's neighbours.⁵⁷⁷ In such a political environment, online arbitration conducted from SA can present an affordable and legally valid dispute resolution process in touch with the reality, customs culture and language of Africa that could produce efficient, neutral and swift results.⁵⁷⁸

Although SA is still developing at different degrees due to its intricate intertwined socio-economic, socio-political and techno-legal environment, online arbitration is no longer a remote dream, but instead a very much a very nearby reality.⁵⁷⁹ SA has already taken the lead with its OADR initiative in domain names and more industry-specific online arbitration solutions are expected to follow suit in the near future.⁵⁸⁰ However, literacy, computer literacy, IT training, confidence building, and the training of more IT and software experts and

⁵⁷⁵ Wahab *op cit* 582.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Ibid.*

⁵⁷⁹ Wahab *op cit* 583.

⁵⁸⁰ *Ibid.*

engineers and the generation of a faster growing economy and the attraction of more FDI remain prerequisites for the growth of online arbitration in SA.⁵⁸¹ Although there are still certain socio-economic, socio-political and techno-legal impediments to the development of online arbitration in SA, it is submitted that the future of online arbitration in SA is not uncertain when it comes to its proliferation. Online arbitration is a nascent industry in SA, and because it has already made a footprint, it will one day form a strong entry point for online arbitration in Africa. Due to traditional African cultures' local custom and tradition to resolve disputes between parties in an amicable way by means of negotiation or facilitation by a local chief or influential person or community elder with standing, it is submitted that online arbitration will in the near future become a more favoured way in which to resolve disputes in SA.

5. FINAL REMARKS

When UNCITRAL decides to revisit the 'Technical Notes' or to compile a set of legal standards that is exclusively focused on online arbitration, it would have to focus on the further regulation of the following legal requirements: (1) the OADR procedure; (2) the global OADR framework, with a focus on both the relevant roleplayers and the components of such a framework; (3) the relevant legal principles; (4) the design of OADR proceedings; (5) the regulation of neutral third parties; (6) the finer points in the OADR proceeding; (7) the enforcement of decisions.

UNCITRAL would also have to focus on the regulation of the following technical requirements: (1) the certification of service providers; (2) incentives for users; (3) the relationship between the OADR service provider and the ODR platform, as well as (4) a technical enforcement protocol.

Even though the legislation, rules and procedures pertaining to a traditional arbitration proceeding can only be applied to a limited extent on its online counterpart, the presence of certain features and challenges nevertheless necessitates that the rules and regulations of online arbitration be interpreted and transposed in such a manner as to make online arbitration an universally acceptable, legally valid and viable alternative to traditional arbitration in all legal jurisdictions of the world.⁵⁸²

In an attempt to achieve this attainable goal, some of the following legal and technical features and challenges of online arbitration will call for particular clarification and regulation, either when UNCITRAL decides to revisit the 'Technical Notes' and make amendments or include annexures or when UNCITRAL decides to compile a set of legal standards exclusively for online

⁵⁸¹ Wahab *op cit* 583.

⁵⁸² Kuner 'An International Legal Framework' *op cit* 311–312.

arbitration.⁵⁸³ not every jurisdiction recognises the legal authority of online documents and electronic signatures, and this will undoubtedly create legal uncertainty with regards to the legality and validity of an online arbitration agreement, and subsequently with regards to the prospects of having an online arbitration award, that was rendered in an online document with an electronic signature, enforced.⁵⁸⁴ Both the service and notification processes that precede an online arbitration proceeding and which occurs by means of online communication will have to be regulated and standardised.⁵⁸⁵ The contemporary framework of traditional arbitration that gets used to also perform online arbitration requires of the parties to select a place or seat for their online arbitration proceeding and this provision causes serious challenges for online arbitration.⁵⁸⁶ Rules and regulations are needed to ensure strict adherence to the requirements of due process of law during online arbitration, which will always, due to the high speed of online communication, be a big challenge.⁵⁸⁷ It is important that the various means of online telecommunication which may be employed for an online arbitration proceeding and their usage are standardised and regulated.⁵⁸⁸ The technical requirements of security that is necessary to protect both the confidentiality as well as the integrity of the online arbitration proceeding will always have to be cutting edge,⁵⁸⁹ and the means that are needed for the enforcement of an online arbitration award could prove to be onerous, but it will always be more expedient to employ means of enforcement that will minimise the potential of judicial intervention, though this alternative is not wholly excluded.⁵⁹⁰ Technical aspects should enhance a party's ability to communicative ability with his adversary, or with a third party.⁵⁹¹ It is important that legal requirements do not unnecessarily burden this ability. At the same it is vital that technical aspects and its velocity honour due process as it can easily be endangered by a lack of sufficient or appropriate communication that will necessarily diminish the confidence in, and quality of justice of, the online arbitration proceeding.⁵⁹² Technical requirements for confidentiality and privacy should be very sophisticated and special attention should also be afforded to data management and security and publication.⁵⁹³ Lastly, since online arbitration involves the presentation of evidence for adjudication online, specific technical means are not only required, but must at the same time also be legally accepted

⁵⁸³ Kuner 'An International Legal Framework' *op cit* 311–312.

⁵⁸⁴ Kuner 'An International Legal Framework' *op cit* 311–312; Swales *op cit* 265 – 270.

⁵⁸⁵ Kuner 'An International Legal Framework' *op cit* 311–312.

⁵⁸⁶ *Ibid.*

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*

⁵⁹⁰ Kuner 'An International Legal Framework' *op cit* 313–314.

⁵⁹¹ *Ibid.*

⁵⁹² *Ibid.*

⁵⁹³ *Ibid.*

and be able to withstand potential legal scrutiny by a national court by conforming to national civil procedural law requirements of a given jurisdiction.⁵⁹⁴

The most feasible manner to realise universal harmonisation is by means of a set of legal standards that is exclusively compiled to regulate online arbitration and that could regulate online arbitration from the Final Phase of the 'Technical Notes' onwards.⁵⁹⁵ Such a set of legal standards that is exclusively compiled for online arbitration should not change or affect the rights or interests of parties involved in the Negotiation Phase or the Facilitated Settlement Phase of the 'Technical Notes' in any way.⁵⁹⁶

In the event that no resolution was reached during the Negotiation Phase or the Facilitated Settlement Phase, such a set of legal standards that is exclusively compiled for online arbitration should allow parties from jurisdictions which accept pre-dispute arbitration provisions to make use of online arbitration during the Final Phase. Parties from jurisdictions who doesn't accept pre-dispute arbitration provisions, should be given the opportunity to willingly submit to online arbitration, post-dispute, during the Final Phase.

Online arbitration is still transforming at a rapid rate due to the IT Revolution, and while this occurs, new legal rules and regulations have to not only be clarified and developed further, but also be implemented to fill all of the legal *lacunae* that the IT Revolution leave in its wake.⁵⁹⁷ At present, many uncertainties still exist in the context of online arbitration and this thesis was an attempt to clarify some of the greatest legal and technical questions on online arbitration.⁵⁹⁸ Thus far UNCITRAL has only taken the infant steps in the field of online arbitration and attention-grabbing innovations no doubt lay and wait just around the corner.⁵⁹⁹

A writer such as Katsh uses the allegory of online arbitration being almost like a sensitive plant which requires the correct nourishment, active care and encouragement to not only grow but to also grow in the right direction.⁶⁰⁰ He is correct in saying that online arbitration requires a reciprocally beneficial relationship between consumer organisations, the governments of the world, the IT and software industry, legal communities, online arbitration professional bodies and online arbitration service providers, online merchants and their representatives and consumer protection bodies – who represent and who are

⁵⁹⁴ Katsch, Rifkin *op cit* 99.

⁵⁹⁵ Chauchan 'OADR System' *Windsor Review* 3(99) (March 2003) 15: Prendes *op cit* 60.

⁵⁹⁶ US Legal 'Procedural Rules; Policy Statements' at <http://administrativelaw.uslegal.com/administrative-agency-rulemaking/procedural-rules-policy-statements/>, accessed 9 October 2015.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Ibid.*

⁶⁰⁰ Katsh *op cit* 956–957.

the custodians of the interests of online buyers. All of these stakeholders should be encouraged to present their respective legal and technical expertise from their perspective, when they all come together to revise the 'Technical Notes' and when UNCITRAL decides to compile a set of legal standards exclusively for online arbitration that will regulate online arbitration during the Final Phase of the 'Technical Notes' so as to look at all of the legal and technical requirements to constitute a more effective *lex electronica arbitralis*.⁶⁰¹

UNCITRAL should pay attention to the most important legal and technical challenges and issues, as set out in this thesis, in an attempt to speed up the successful roll-out of online arbitration mechanisms in a cross-border virtual environment of cyberspace.⁶⁰² The legal and technical solutions to the legal *lacunae* do not comprise insurmountable challenges to a successful deployment of online arbitration in cyberspace.⁶⁰³ It is important that legal developments must stay abreast with new developments in the technical, IT and software fields as the increase of online arbitration is inexorably linked to the IT Revolution.⁶⁰⁴

The *lex electronica arbitralis* must have an established and practical legal framework which will make provision for the proper functioning of the online arbitration mechanism and that will also make provision for the recognition of enforcement of the outcome of the online arbitration proceeding so that it is similar to, and just as effective as, the outcome of litigation in a national court.⁶⁰⁵

The legal consequences that today's IT and software applications has on online arbitration is profound and it is of the utmost importance that the law should never become out-dated and that it should always stay abreast with the times.⁶⁰⁶ Cyberspace is a rapidly transforming medium that presents new opportunities and challenges on a daily basis in such a way that the IT and software applications that we have at our disposal at the moment, will no doubt be outdated and incompatible with the IT and software applications that will appear in a few months to a few years from now.⁶⁰⁷ Forecasting any predictions on the direction which the IT Revolution will go in even a few months from now, in particular when it involves the Internet, is a minefield.⁶⁰⁸ Cyberspace is in a state of flux and this fluctuation occurs both with regards to who makes use of it, how they use it as well as what they use it for.⁶⁰⁹ Simultaneously, the transformation of the online economy will create new prospects for online

⁶⁰¹ Katsh *op cit* 956–957.

⁶⁰² Katsh *op cit* 957–959.

⁶⁰³ *Ibid.*

⁶⁰⁴ *Ibid.*

⁶⁰⁵ Katsh *op cit* 959–960.

⁶⁰⁶ Katsh *op cit* 960–961.

⁶⁰⁷ *Ibid.*

⁶⁰⁸ *Ibid.*

⁶⁰⁹ *Ibid.*

arbitration in the future and will undoubtedly also play its part in directing the development of the online arbitration framework.⁶¹⁰

When UNCITRAL revisits the 'Technical Notes' or decide to compile a set of legal standards exclusively for online arbitration, they should also leave some options open to enable the integration of new IT and software applications. It is only through constant upkeep and updating that all of the legal and technical requirements that could constitute a more effective *lex electronica arbitralis* could help online arbitration attain its maximum potential.⁶¹¹

⁶¹⁰ Katsh, Rifkin *op cit* 9.

⁶¹¹ Katsh *op cit* 959–960.

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